Supreme Court of the United States

OCTOBER TERM, 1960

No. 566

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

vs.

FRANCISCO MENDOZA-MARTINEZ

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

INDEX

[fol. 1]

SUPREME COURT OF THE UNITED STATES

No. 54, October Term, 1957

FRANCISCO MENDOZA-MARTINEZ, PETITIONER

vs.

ARGYLE F. MACKEY, Commissioner of Immigration and Naturalization Service and WILLIAM P. ROGERS, Attorney General of the United States

JUDGMENT—April 7, 1958

On writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Ninth Circuit, and was duly submitted.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United tSates District Court for the Southern District of California for determination in light of Trop v. Dulles, Secretary of State, No. 70, October Term, 1957, decided March 31, 1958.

April 7, 1958

[SEAL]

A true copy JOHN T. FEY,
Test:

Clerk of the Supreme Court of the United States

Certified this Twelfth day of May, 1958
By R. J. Blanchard, Deputy

[fol. 2] [File endorsement omitted]

• • • •

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

Civil No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF

v.

ARGYLE R. MACKEY, The Commissioner of Immigration and Naturalization, and WILLIAM P. ROGERS, Attorney General of the United States, DEFENDANTS

TRIAL STIPULATION—Filed July 7, 1958

The following admissions and agreements of fact were made by the parties and require no proof:

I.

The plaintiff, Francisco Mendoza-Martinez claims residence within the City of Delano, State of California, and within the jurisdiction of this Court.

II.

The defendant, William P. Rogers, is the duly appointed, qualified and acting Attorney General of the United States, and as such is the head of the Department of Justice.

III.

Plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States at birth.

[fol. 3]

IV.

Under the laws of Mexico plaintiff is now, and ever since his birth has been, a citizen and national of the Republic of Mexico.

V.

During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VI.

Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VII.

On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940. He was sentenced to imprisonment for a period of one year and one day.

VIII.

On February 3, 1953 a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

IX.

Plaintiff appealed the decision of the Special Inquiry Officer to the Board of Immigration Appeals, Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

[fol. 4]

X.

The cause herein is submitted to the Court for decision upon the above admissions and agreements, all the records and files herein and all evidence heretofore received.

ISSUES OF FACT TO BE TRIED

None

ISSUES OF LAW

I.

Is Section 401 (j) of the Nationality Act of 1940 unconstitutional; either on its face or as applied to the plaintiff?

The foregoing Trial Stipulation is hereby approved.
DATED: This 30th day of June, 1958.

DI GIORGIO AND DAVIS

By Thomas R. Davis
Attorneys for Plaintiff.
LAUGHLIN E. WATERS
United States Attorney
RICHARD A. LAVINE
Assistant U. S. Attorney
Chief of Civil Division

/s/ James R. Dooley
JAMES R. DOOLEY
Assistant U. S. Attorney
Attorneys for Defendants

The foregoing admissions of fact having been made by the parties, and issues of fact and law being thereupon stated and agreed to; the Court hereby approves the [fol. 5] foregoing Trial Stipulation which shall govern the course of the trial unless modified to prevent manifest injustice.

DATED: This 7th day of July, 1958.

/s/ Gilbert H. Jertberg
Judge, U. S. District Court

[fol. 6] [File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

Civil No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF

v.

ARGYLE R. MACKEY, The Commissioner of Immigration and Naturalization, and WILLIAM P. ROGERS, Attorney General of the United States, DEFENDANTS

MEMORANDUM AND ORDER—Sept. 24, 1958

On the 22nd day of September, 1955, this Court entered judgment in the above cause, which judgment adjudicated and decreed that the plaintiff lost his United States citizenship and nationality through expatriation by remaining outside the jurisdiction of the United States after September 27, 1944, in time of war and during a period declared by the President of the United States to be a period of national emergency, for the purpose of evading and avoiding training and service in the land and naval forces of the United States. This judgment was affirmed by the Court of Appeals for the Ninth Circuit on November 2, 1956. (238 Fed. 2d 239)

[fol. 7] On April 7, 1958, the Supreme Court of the United States vacated the judgment and remanded the cause "to the United States District Court for determination in light of *Trop* v. *Dulles*, ante, p. 86, decided March 31, 1958". (356 U.S. 258)

Pursuant to the order of the Supreme Court a hearing was held on July 10, 1958. The plaintiff was represented by DiGiorgio and Davis, Thomas R. Davis appearing, and the defendant was represented by Laughlin E. Waters, United States Attorney, James R. Dooley, Assistant United States Attorney, appearing.

At the original trial, the only issue presented to the Court for determination was the constitutionality of Section 401(j) of the Nationality Act of 1940 (54 Stat. 1137)

as amended, the parties having stipulated that the plaintiff, a citizen of the United States by birth, at the age of 20 and while subject to the Selective Service and Training Act, (Title 50 App. U.S.C.A. 312 et seq) in the year 1942 departed from the United States for the Republic of Mexico for the sole purpose of evading and avoiding training and service in the armed forces of the United States, and remaining in Mexico continuously from some time in 1942 until on or about November 1, 1946; for the sole purpose of evading and avoiding such training and service.

At the hearing held on July 1[illegible], 1958, the cause was submitted to the Court for determination on a trial stipulation of the parties containing the following provisions:

1. Plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth.

[fol. 8] 2. Under the law of Mexico, plaintiff, now and ever since his birth, has been a citizen and national of the Republic of Mexico.

3. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

4. Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

5. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940. He was sentenced to imprisonment for a period of one year and a day.

6. On February 3, 1953, a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

7. Plaintiff appealed the decision of the Special In-

quiry Officer to the Board of Immigration Appeals, Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

8. Issues of fact to be tried: None.

9. Issues of law: Is Section 401(j) of the Nationality Act of 1940 unconstitutional, either on its face or as applied to the plaintiff?

[fol. 9] The trial stipulation provided that the cause would be submitted to the Court for decision on said stipulation and on all of the records, files and evidence theretofore received.

The proof in this cause is conclusive that the plaintiff, a citizen of the United States, departed from the United States for the Republic of Mexico for the sole purpose of evading and avoiding training and service in the armed forces of the United States, and remained in Mexico continuously from some time in 1942 until on or about 1946 for the sole purpose of evading and avoiding such training and service.

I have reconsidered this case in the light of *Trop* v. *Dulles*, 356 U.S. 86, as directed by the Supreme Court. The Trop case did not involve Section 401(j) of the Nationality Act of 1940, but involved Section 401(g) of that Act which provides that a citizen shall lose his nationality "by deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by a court martial and as a result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces; * *"

In the Trop case, the Chief Justice, in an opinion joined by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Whittaker, concluded that even if citizenship could be divested in the exercise of some governmental power, Section 401(g) violates the Eighth Amendment because it is penal in nature and prescribes a "cruel and unusual punishment".

Mr. Justice Black in an opinion joined by Mr. Justice Douglas concurred in the opinion of the Chief Justice and expressed the view that even if citizenship could be involuntarily divested, the power to denationalize cannot be placed in the hands of military authorities.

[fol. 10] Mr. Justice Brennan concluded that it lies beyond the power of Congress to enact Section 401(g) because "the requisite rational relation between this statute and the war power does not appear • • • ".

On the same day as the decision in the Trop case, the Supreme Court rendered its decision in *Perez* v. *Brownell.* (356 U.S. 44). In that case the petitioner, a national of the United States by birth, had been declared to have lost his American citizenship by operation of Section 401(e) and Section 401(j) of the Nationality Act of 1940 as amended. Section 401 of that Act provided that "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: • • • (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. • • • • • (j) Departing from or remaining outside the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United Sttaes."

Mr. Justice Frankfurter delivered the opinion of the Court which held Section 401(e) to be constitutional. In a closing paragraph of the opinion it is stated: "It cannot be said, then, that Congress acted without warrant when, pursuant to its power to regulate the relations of the United States with foreign countries, it provided that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship. To deny the power of Congress to [fol. 11] enact the legislation challenged here would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard." (356 U.S. 62.)

In the closing paragraph of that opinion it is stated:

"Because of our view concerning the power of Congress with respect to Section 401(e) of the Nationality Act of 1940, we find it unnecessary to consider—indeed, it would be improper for us to adjudicate—the constitutionality of Section 401(j), and we expressly decline to rule on that important question at this time."

In his opinion in the Trop case, the Chief Justice stated: "Since a majority of the Court concluded in *Perez* v. *Brownell*, that citizenship may be divested in the exercise of some governmental power, I deem it appropriate to state additionally why the action taken in this case exceeds constitutional limits, even under the majority's decision in Perez. The Court concluded in *Perez* that citizenship could be divested in the exercise of the foreign affairs power. In this case, it is urged that the war power is adequate to support the divestment of citizenship. But there is a vital difference between the two statutes that purport to implement these powers by decreeing loss of citizenship. The statute in *Perez* decreed loss of citizenship—so the majority concluded—to eliminate those international problems that were thought to arise by reason of a citizen's having voted in a foreign election. The statute in this case, however, is entirely different. Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401(j) of the Nationality Act, decreeing loss of citizenship for evading the draft by remaining outside the United States. This provision was also before the Court in *Perez*, but the majority declined to con- [fol. 12] sider its validity. While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed. Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial."

After studying the opinion rendered by the Supreme Court in the Trop and Perez cases, I have concluded that the law which must govern my re-consideration of the case under review is that Congress has the power to divest citizenship if a rational nexus exists between the content of a specific power in Congress and the action of Congress in carrying that power into execution, unless the action of Congress runs afoul of some provision of the Constitution, such as in the Trop case, the Eighth Amendment.

It is my view that the only powers of Congress which need to be considered in the reconsideration of this case

are (1) the power to regulate foreign affairs which power is fully set forth in the Perez case, and (2) the war powers of Congress set forth in Article 1, Section 8, Clauses 11, 11, 12, 13, 14 and 18 of the Constitution of the United States.

It is the position of counsel for the defendant that Congress had the power to enact Section 401(j) under its powers to regulate foreign affairs and relied upon the Perez case in support of his position. In the Perez case the petitioner voted in a politically significant election while living in Mexico, which act was construed in the Perez case "as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizen-[fol. 13] ship," and as stated in the majority opinion in the Perez case, "makes the act potentially embarrassing to the American government and pregnant with the possibility of embroiling this country in disputes with other nations."

The petitioner's act in departing for Mexico for the purpose of evading training and service in the armed forces is to be condemned. It was an act for which he should have been and was punished. Such conduct, however, does not show a renunciation of his citizenship or an allegiance to a foreign power. While physically present in Mexico the petitioner committed no act which would import a dilution of his American citizenship or which might conceivably embarrass our government. So far as the record in this case shows, the conduct of the petitioner in Mexico was no different than the conduct of law-abiding American citizens who were lawfully in Mexico on visas or passports. It could not be contended that their physical presence in Mexico was a dilution of their American citizenship or that their presence there might be potentially embarrassing to the American government. I am unable to find any rational relationship between the power of Congress to regulate foreign affairs and the enactment by Congress of Section 401(j).

Under the so-called "war powers", Congress has the power to provide for the common defense; to declare war; to raise and support armies; to make rules for the gov-

ernment and regulation of the land and naval forces; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

Is there a rational relationship between the powers above described and the enactment of Section 401(j)? Conceivably, Congress may have thought that making loss of citizenship a consequence of departing from the United States or remaining out of the United States in time of [fol. 14] war for the purpose of evading or avoiding training and service in the land and naval forces of the United States would deter citizens subject to such training and service from evading such service in such manner, and would thereby assist the authorities in raising the requisite manpower to successfully prosecute a war or provide for the common defense, or, conceivably, Congress may have thought that the morale of those who were subject to such service and training or those who had already been drafted into the service would be increased and thereby the efficiency of the armed forces might be improved.

Congress, however, enacted the Selective Service and Training Act of 1940, as amended, (50 App. U.S.C.A.). Section 311 thereof dealt with offenses and punishment under that Act. Said section provided, in substance, that any person who shall knowingly fail or neglect to perform any duty required by the Act or the rules and regulations made or directions given thereunder, or who shall otherwise evade registration and service in the land or naval forces, shall, upon conviction, be punished by imprisonment for not more than five years, or by a fine of not more than $10,000.00, or by both such fine and imprisonment. The penalty applies regardless of whether the violation is by departing from the United States or in some other manner. In the instant case, the plaintiff departed from the United States for the purpose of evading service in the land and naval forces of the United States. He committed a felony for which he was subject to trial and punishment. For such violation, he plaintiff was punished by incarceration for a period of one year and one day and also suffered the loss of rights which resulted from conviction of a felony. If the plaintiff had remained in the United States and had evaded

service under the Selective Service and Training Act, he would have committed the same offense and would have [fol. 15] suffered the penalty provided for such violation, but he would not have been subject to expatriation.

It is my conviction that the enactment of Section 311 accomplished all legitimate purposes that Congress could have reasonably considered in the enactment of Section 401(j), and that any relationship between the enactment of Section 401(j) and the war powers of Congress is extremely tenuous and ineffectively remote. I am unable to find that the enactment of Section 401(j) could be reasonably calculated to implement war powers possessed by Congress.

My views on Section 401(j) are similar to the views entertained by Mr. Justice Brennan on Section 401(g) in his concurring opinion in *Trop* v. *Dulles*. Mr. Justice Brennan stated in the last paragraph of that opinion as follows:

> "I therefore must conclude that Section 401(g) is beyond the power of Congress to enact. Admittedly, Congress' belief that expatriation of the deserter might further the war effort might find some—though necessarily slender—support in reason. But here, any substantial achievement, by this device, of Congress' legitimate purposes under the war power seems fairly remote. It is at the same time abundantly clear that these ends could more fully be achieved by alternative methods not open to these objections. In the light of these factors, and conceding all that I possibly can in favor of the enactment, I can only conclude that the requisite rational relationship between this statute and the war power does not appear—for in this relation the statute is not 'really calculated to effect any of the objects entrusted to the government • • •', McCulloch v. Maryland, 4 Wheat. 316, 423—and therefore that Section 401(g) falls beyond the domain of Congress."

For the reasons herein expressed, I hold that Section 401(j) is unconstitutional and therefore the plaintiff is entitled to the relief sought in his amended complaint.

[fol. 16] Counsel for the plaintiff is directed to prepare and lodge proposed findings of fact, conclusions of law and form of judgment consistent with the views herein expressed.

The Clerk of this Court is directed to forthwith mail copies of this memorandum to all counsel.

Dated: September 24th, 1958.

/s/ Gilbert H. Jertberg
Judge,
United Stafes District Court

[fol. 17] [File endorsement omitted]

• • • •

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 1314-ND

FRANCISCO MÉNDOZA-MARTINEZ, PLAINTIFF

v.

ARGYLE R. MACKEY, The Commissioner of Immigration and Naturalization, and WILLIAM P. ROGERS, Attorney General of the United States, DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT—October 20, 1958

FINDINGS OF FACT

1. Plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth.

2. Under the law of Mexico, plaintiff, now and ever since his birth, has been a citizen and national of the Republic of Mexico.

3. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

4. Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946, for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

5. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940. He was sentenced to imprisonment for a period of one year and a day.

[fol. 18] 6. On February 3, 1953, a warrant of arrest in deportation proceedings was served upon the plaintiff.

Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

7. Plaintiff appealed the decision of the Special Inquiry Officer to the Board of Immigration Appeals, Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

8. On the 22nd day of September, 1955, this Court entered judgment in the above cause, which judgment adjudicated and decreed that the plaintiff lost his United States citizenship and nationality through expatriation by remaining outside the jurisdiction of the United States after September 27, 1944, in time of war and during a period declared by the President of the United States to be a period of national emergency, for the purpose of evading and avoiding training and service in the land and naval forces of the United States.

9. This judgment was affirmed by the Court of Appeals for the Ninth Circuit on November 2, 1956.

10. On April 7, 1958, the Supreme Court of the United States vacated the judgment and remanded the cause "to the United States District Court for determination in light of *Trop* v. *Dulles*, ante, p. 86, decided March 31, 1958."

Conclusions of Law

1. This Court has jurisdiction over the parties and over this cause.

2. Section 401j of the Nationality Act of 1940, a 1944 Amendment, under which defendant claims the plaintiff lost his United States citizenship, is unconstitutional.

3. Plaintiff should be declared to be a citizen of the United States.

4. Any and all prior orders or decrees by the Commissioner of Immigration and Naturalization, by the Board of Immigration Appeals, or by any other board or person whomsoever, declaring the plaintiff to be an alien and to have lost his United States citizenship, and any

such order or decree directing that plaintiff be deported from the United States, should be declared null and void [fol. 19] and of no further force or effect.

JUDGMENT

The above entitled cause having come on regularly for hearing on the 10th day of July, 1958, before the Hon. Gilbert H. Jertberg, Judge Presiding without a jury, the plaintiff being represented by his attorneys DiGiorgio and Davis, by Thomas R. Davis, and the defendants being represented by their attorneys, Laughlin E. Waters, United States Attorney, Richard A. Lavine, Assistant U. S. Attorney, and James R. Dooley, Assistant U. S. Attorney, by James R. Dooley; and the facts having been submitted by written stipulation and written memorandum having been submitted by defendants only, and oral argument having been heard; it is hereby

ORDERED, ADJUDGED AND DECREED that Section 401j of the Nationality Act of 1940, a 1944 Amendment, is unconstitutional; that plaintiff is a citizen of the United States; that any and all prior orders or decrees by the Commissioner of Immigration and Naturalization, by the Board of Immigration Appeals, or by any other board or person whomsoever, declaring the plaintiff to be an alien and to have lost his United States citizenship, and any order or decree directing that plaintiff be deported from the United States be, and the same hereby is, declared null and void and of no further force or effect.

DATED: This 20th day of October, 1958.

/s/ Gilbert H. Jertberg
Judge, U. S. District Court

[fol. 20] [File endorsement omitted]

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF

v.

ARGYLE R. MACKEY, The Commissioner of Immigration and Naturalization, and WILLIAM P. ROGERS, Attorney General of the United States, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES Filed Nov. 17, 1958

I. Notice is hereby given that the above-named defendants appeal to the Supreme Court of the United States from the judgment of the District Court, entered October 21, 1958, declaring the plaintiff to be a citizen of the United States and prohibiting the deportation of the plaintiff as an alien, on the ground that Section 401(j) of the Nationality Act of 1940, as amended, is unconstitutional.

This appeal is taken pursuant to 28 U.S.C. 1252.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Printed Transcript of Record as filed in the Court of Appeals for the Ninth Circuit in No. 14997, 1956 Term.

[fol. 21] 2. Opinion of the Court of Appeals for the Ninth Circuit dated November 2, 1956.

3. Mandate of the Supreme Court.

4. Stipulation submitted to the Court at the hearing held on July 10, 1958.

5. Memorandum and Order of the District Court dated September 24, 1958.

6. Findings of Fact, Conclusions of Law and Judgment, entered October 21, 1958.
7. This Notice of Appeal.

III. The following question is presented by this appeal:

A. Whether Congress had constitutional power to provide in Section 401(j) of the Nationality Act of 1940, as amended, that a United States national shall lose his United States nationality by departing from or remaining outside the jurisdiction of the United States in time of war or national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

LAUGHLIN E. WATERS
United States Attorney.
RICHARD A. LAVINE
Assistant U. S. Attorney
Chief of Civil Division

/s/ James R. Dooley
JAMES R. DOOLEY
Assistant U. S. Attorney
Attorneys for Defendants.

[fol. 22] AFFIDAVIT OF SERVICE BY MAIL—
(Omitted in Printing)

[fol. 23] Clerk's Certificate—(Omitted in Printing)

[fol. 24] SUPREME COURT OF THE UNITED STATES

No. 649, October Term, 1958

ORDER NOTING PROBABLE JURISDICTION—March 9, 1959

APPEAL from the United States District Court for the Southern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

March 9, 1959

[fol. 20] SUPREME COURT OF THE UNITED STATES

No. 29, October Term, 1959

MACKEY, Commissioner of Immigration and Naturalization Service, et al., APPELLANTS

vs.

FRANCISCO MENDOZA-MARTINEZ

JUDGMENT—April 18, 1960 (Filed in U.S.D.C.—June 1, 1960)

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Southern District of California, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that this cause be, and the same is hereby, remanded to the District Court with permission to the parties to amend the pleadings, if they so desire, to put in issue the question of collateral estoppel and to obtain an adjudication upon it.

April 18, 1960

Dissenting opinion by Mr. Justice Clark with whom Mr. Justice Harlan and Mr. Justice Whittaker join.
Separate opinion by Mr. Justice Frankfurter.

[SEAL]

A true copy

Test: JAMES R. BROWNING
Clerk of the Supreme Court of the United States
Certified this twenty-sixth day of May, 1960

By /s/ J. H. Blanchard
Deputy

[fol. 21] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 1314 ND

FRANCISCO MENDOZA-MARTINEZ, Route 2, Box 412, Delano, California, PLAINTIFF

vs.

ARGYLE R. MACKEY, The Commissioner of Immigration and Naturalization, and HERBERT BROWNELL, Attorney General of the United States, DEFENDANTS

SECOND AMENDED COMPLAINT (Amended pursuant to mandate of the Supreme Court of the United States)

Filed June 30, 1960

Comes now the plaintiff and for cause of action alleges:

I

This is an action for a declaratory judgment as authorized by Section 1503a of Title 8 of the United States Code, and is brought because there is an actual controversy now existing between the parties to the above-entitled action, as to which plaintiff now seeks the judgment of this court.

II

The jurisdiction of this court is based on Section 1503 of Title 8 of the United States Code.

III

Plaintiff resides in Delano, California, and in the Southern District of California.

IV

Plaintiff was born on the 3rd day of March, 1922, in [fol. 22] Bealville, California, United States of America.

V

In the year 1947 plaintiff was indicted in the District Court of the United States in and for the Southern District of California, Northern Division, for draft evasion in violation of the Selective Service and Training Act of 1940; a copy of said indictment is attached hereto as Exhibit "A"; thereafter and on or about June 23, 1947, plaintiff was adjudged guilty of the first count of the indictment aforesaid and sentenced to imprisonment for one year and one day by the Honorable Leon R. Yankwich presiding; a copy of said judgment and commitment is attached hereto as Exhibit "B"; under said judgment and commitment plaintiff thereafter was in fact imprisoned for the term therein provided.

VI

Plaintiff has been ordered deported from the United States by the defendants under authority of Section 401-j of the Immigration and Nationality Act of 1940.

VII

Pursuant to the requirement of a final administrative denial contained in Section 1503a of Title 8 of the United States Code, plaintiff has appealed to the Board of Immigration Appeals and the finding below has been confirmed.

VIII

Plaintiff relies first here upon his contention that the government of the United States has admitted the fact of his United States citizenship by virtue of the indictment and judgment of conviction attached hereto as Exhibits "A" and "B" and is therefore collaterally estopped now to deny such citizenship; plaintiff further contends that even if this be not so, Section 401-j of the Immigration and Nationality Act of 1940 as amended in 1944 is unconstitutional. Because of the collateral estoppel aforesaid and because of said unconstitutionality, plaintiff is and should be declared a citizen of the United States. As such citizen, plaintiff is not subject to deportation by

any law or statute of the United States and the order of deportation should be declared void and of no effect.

WHEREFORE, plaintiff prays that the Court adjudge:

[fol. 23] (1) That the defendants are estopped now to deny the United States citizenship of the plaintiff.

(2) That Section 401-j of the Immigration and Nationality Act of 1940 as amended in 1944 is unconstitutional and void "as applied to the plaintiff and on its face".

(3) That plaintiff is a citizen of the United States.

(4) That any and all orders of deportation directed against the plaintiff are void and of no force or effect whatever and that defendants herein are enjoined and restrained henceforth from enforcing them.

DI GIORGIO AND DAVIS

/s/ Thomas R. Davis
Attorneys for Plaintiff
1021 Chester Avenue
Bakersfield, California
Telephone FAirview 4-4054

[fol. 24] EXHIBIT "A" TO
SECOND AMENDED COMPLAINT

FILED JUN 11 1947
EDMUND L. SMITH, Clerk
By Wm. A. White, Deputy Clerk

IN THE
DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

April 1947, Term

No. 2771

INDICTMENT

(U.S.C., Title 50, App., Sec. 311—Selective Training and Service Act, 1940, as amended)

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK MARTINEZ MENDOZA, DEFENDANT

The grand jury charges:

COUNT ONE

(U.S.C., Title 50, App., Sec. 311)

Defendant FRANK MARTINEZ MENDOZA, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, as amended, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137, said board being then and there duly created and acting, under the Selective Service System established by said act, in Kern County, California, in the Northern Division of the Southern District of California; and on or about November 15, 1942, in

violation of the provisions of said act and the regulations promulgated thereunder, the defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 1, 1946.

COUNT TWO

(U.S.C., Title 50, Appx., Sec. 311)

Defendant FRANK MARTINEZ MENDOZA, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, as amended, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137, said board being then and there duly created and acting, under the Selective Service System established by said act, in Kern County, California, in the Northern Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on December 11, 1942, in Kern County, California, in the division and district aforesaid; and at said place, on or about December 11, 1942, and at all times thereafter, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do.

[fol. 25]

COUNT THREE

(U.S.C., Title 50, Appx., Sec. 311)

Defendant FRANK MARTINEZ MENDOZA, a male person within the class made subject to selective service under

the Selective Training and Service Act of 1940, as amended, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137, said board being then and there duly created and acting, under the Selective Service System established by said act, in Kern County, California, in the Northern Division of the Southern District of California; and on or about December 1, 1942, and at all times thereafter, in Kern County, California, within the division and district aforesaid, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he knowingly failed and neglected to keep said Local Board No. 137 advised of the address where mail would reach him.

A TRUE BILL

(signature) JOHN M. MACADAM
Foreman

(signature) JAMES M. CARTER
United States Attorney

RHK:AH

[fol. 26] EXHIBIT "B" TO
SECOND AMENDED COMPLAINT

D.C.Form 61a

Judgment and Commitment
on the first count

DISTRICT COURT OF THE UNITED STATES
Southern District of California, Northern Division.

No. 2771 Criminal

in Three counts for violation of U.S.C., Title 50, App.,
Sec. 311, Selective Training and Service Act
Secs. 1940 as amended

UNITED STATES

v.

FRANK MARTINEZ MENDOZA

On this 23rd day of June, 1947 came the United States Attorney, and the defendant Frank Martinez Mendoza appearing in proper person, and without counsel and defendant having been informed of his right to counsel and a jury trial and having waived the same,

The defendant having been convicted on his plea of guilty of the offense charged in the first count in the above-entitled cause, to wit:

Having on or about November 15th 1942, knowingly departed from the United States to Mexico, for the purpose of evading service in the land or naval forces of the United States and having remained there until on or about November 1st 1946.

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is BY THE COURT

ORDERED AND ADJUDGED that the defendant, having been found guilty of said offenses, is hereby committed to the

custody of the Attorney General or his authorized representative for imprisonment for the period of one year and one day in an institution of the penitentiary type, on the first count.

IT IS FURTHER ORDERED that the second and third counts be dismissed, it appearing to the court that the offenses charged therein arose out of the same circumstances.

The court does not deem a reference necessary to the Probation Office prior to sentence.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein on the first count

(signed) LEON R. YANKWICH
United States District Judge

The Court recommends commitment of Penitentiary type institution.

A TRUE COPY. Certified this 23rd day of June 1947.
(signed) EDMUND L. SMITH, Clerk

(By) Francis E. Cross, Deputy Clerk

[fol. 27]

No.

UNITED STATES

v.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on to

Defendant noted appeal on and released on

Did on)
Did not) elect to enter upon service of sentence

Defendant's appeal determined on

Defendant surrendered on

Defendant delivered on July 15, 1947 to Federal Road Camp at McNeil Island, Washington, the institution designated by the Attorney General, together with certified copy of the within Judgment and Commitment.

Robert E. Clark
U. S. Marshal

By (sgd) T. R. Keefe
Deputy

FILED Aug. 5 1947
EDMUND L. SMITH, Clerk
By (sgd) Maxine Lewis
Deputy Clerk

[fol. 27a] • • • •

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

[Title omitted]

ANSWER TO SECOND AMENDED COMPLAINT—
Filed July 8, 1960

The defendants above named, by and through the undersigned, in answer to the Second Amended Complaint on file herein, admit, deny and allege as follows:

I.

Neither admit nor deny the allegations contained in paragraphs I and II on the ground that said allegations are conclusions of law.

II.

Defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III, and on that ground deny said allegations.

III.

Admit the allegations contained in paragraph IV.

[fol. 29] IV.

Admit the allegations contained in paragraph V, except the last clause which reads "under said judgment and commitment plaintiff thereafter was in fact imprisoned for the term therein provided." With respect to the excepted clause, defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and on that ground deny said allegations.

V.

Defendants deny the allegations contained in paragraph VI and allege instead that plaintiff has been ordered deported from the United States under the authority of Section 241(a)(1) of the Immigration and Nationality Act of 1952 after it was determined that plaintiff had lost his United States nationality under the provisions of Section 401(j) of the Nationality Act of 1940 as amended.

VI.

Admit the allegations contained in paragraph VII.

VII.

Deny each and every allegation contained in paragraph VIII.

For a Further, Separate and First Affirmative Defense, Defendants Allege:

I.

Plaintiffw as born in the United States on March 3, 1922 of Mexican parents and thus acquired citizenship and nationality of the United States at birth. Under the laws of Mexico, plaintiff was also at birth, and still is, a citizen and national of the Republic of Mexico.

[fol. 30]

II.

During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading or avoiding training and service in the land or naval forces of the United States; and plaintiff volantarily remained in Mexico from some time during 1942 until on or about November 1, 1946 for the sole purpose of evading or avoiding training and service in the land or naval forces of the United States.

III.

Under the provisions of Section 401(j) of the Nationality Act of 1940, as amended, plaintiff lost his United

States citizenship and nationality by remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

FOR A FURTHER, SEPARATE AND SECOND AFFIRMATIVE DEFENSE, DEFENDANTS ALLEGE:

I.

The Second Amended Complaint on file herein fails to state a claim upon which relief can be granted.

WHEREFORE, defendants pray for a judgment dismissing said Complaint, denying the relief prayed for therein, and for such other relief as to the Court seems just and proper in the premises.

DATED: This 8th day of July, 1960.

LAUGHLIN E. WATERS
United States Attorney
RICHARD A. LAVINE
Assistant U. S. Attorney
Chief of Civil Division

/s/ James R. Dooley
JAMES R. DOOLEY
Asst. U. S. Atty.
Attorneys for Defendants.

JRD:bsh

[fol. 30a] CERTIFICATE OF SERVICE BY MAIL
(Omitted in Printing)

[fol. 31] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

[Title omitted]

AMENDED TRIAL STIPULATION—Filed August 17, 1960

The following admissions and agreements of fact were made by the parties and require no proof:

I.

The plaintiff, Francisco Mendoza-Martinez, claims residence within the City of Delano, State of California, and within the jurisdiction of this Court.

II.

The defendant, William P. Rogers, is the duly appointed, qualified and acting Attorney General of the United States, and as such is the head of the Department of Justice.

III.

The within action may be dismissed as to the defendant, Argyle R. Mackey, The Commissioner of Immigration and Naturalization, only.

[fol. 32]

IV.

Plaintiff was born in the United States on March 3, 1922 and thus was a citizen and national of the United States at birth.

V.

Under the laws of Mexico plaintiff is now, and ever since his birth has been, a citizen and national of the Republic of Mexico.

VI.

During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VII.

Plaintiff had resided in the United States from the date of his birth up to the time of his departure from the United States as set forth in Paragraph VI above.

VIII.

Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

IX.

On June 23, 1947 plaintiff, upon his plea of guilty, was convicted in the United States District Court for the Southern District of California, Northern Division, for violation of Section 11 of the Selective Training and Service Act of 1940, as amended [U. S. C., Title 50, App., Sec. 311]. He was sentenced to imprisonment for a period of one year and one day, and thereafter served his sentence.

[fol. 33]

X.

On February 3, 1953 a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

XI.

Plaintiff appealed the decision of the Special Inquiry Officer to the Board of Immigration Appeals, United States Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

XII.

The within cause is submitted to the Court for decision upon the above admissions and agreements, all the records

and files herein, all evidence heretofore received, together with the following exhibits to be offered at trial:

1. Indictment in United States of America v. Frank Martinez Mendoza, No. 2771.

2. Judgment and Commitment on the first count in *United States of America* v. *Frank Martinez Mendoza*, No. 2771.

ISSUES OF FACT TO BE TRIED

None

ISSUES OF LAW

1. Is the defendant herein estopped by reason of the indictment and conviction of plaintiff for violation of Section 11 of the Selective Training and Service Act of 1940, as amended [U. S. C., Title 50, App., Sec. 311], from denying that the plaintiff is now a national and citizen of the United States?

[fol. 34] 2. Is Section 401 (j) of the Nationality Act of 1940, as amended, unconstitutional, either on its face or as applied to the plaintiff herein?

The foregoing Amended Trial Stipulation is hereby approved.

DATED: This 15th day of August, 1960.

DI GIORGIO AND DAVIS

By /s/ Thomas R. Davis
Attorneys for Plaintiff.

LAUGHLIN E. WATERS
United States Attorney
RICHARD A. LAVINE
Assistant U. S. Attorney
Chief of Civil Division.

/s/ James R. Dooley
Assistant U. S. Attorney
Attorneys for Defendants.

The foregoing admissions of fact having been made by the parties, and issues of fact and law being thereupon stated and agreed to; the Court hereby approves the foregoing Amended Trial Stipulation which shall govern the course of the trial unless modified to prevent manifest injustice.

DATED: This 17th day of August, 1960.

/s/ Gilbert H. Jertberg
United States District Judge

JHD:bsh

[fol. 35]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 1314-ND

FRANCISCO MENDOZA MARTINEZ, PLAINTIFF

vs.

WILLIAM P. ROGERS, Attorney General of the United States, DEFENDANT

MEMORANDUM AND ORDER—September 22, 1960

The above cause is before the court for the third time. On the 22nd day of September 1955, this court entered judgment which adjudged and decreed that plaintiff lost his United States citizenship and nationality through expatriation by remaining outside the jurisdiction of the United States after September 27, 1944, in time of war and during a period declared by the President of the United States to be a period of national emergency, for the purpose of evading and avoiding training and service in the land and naval forces of the United States. On April 7, 1957, the Supreme Court of the United States vacated the judgment, and remanded the cause "to the United States District Court for determination in light of *Trop* v. *Dulles*, ante, p. 86, decided March 31, 1958". 356 U.S. 258.

[fol. 36] Pursuant to the order of the Supreme Court a hearing was held before this court on July 10, 1958.

At the hearing held on July 10, 1958, the only issue presented to the court for determination was an issue of law which the parties posed as follows: Is Section 401(j) of the Nationality Act of 1940 [54 Stat. 1137] unconstitutional, either on its face or as applied to plaintiff? The issue of law to be determined was submitted to the court on a written trial stipulation wherein the parties stipulated:

1. That plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth;

2. Under the laws of the Republic of Mexico plaintiff was then and ever since his birth had been a citizen and national of the Republic of Mexico;

3. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the armed forces of the United States;

4. Plaintiff remained in Mexico continuously from some time during 1942 until on or about November 1, 1946, for the sole purpose of evading and avoiding training and service in the armed forces of the United States;

5. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California, for violation of Section 11 of the Selective Service and Training Act of 1940, and he was sentenced to imprisonment for a period of one year and one day;

6. On February 3, 1953, a warrant of arrest, in deportation proceedings was served upon plaintiff. Pursuant to this warrant a deportation hearing was held on May 25, [fol. 37] 1953, and on September 11, 1953, the special inquiry officer who presided at the hearing rendered his decision ordering that plaintiff be deported from the United States as an alien; and

7. Plaintiff appealed the decision of the special inquiry officer to the Board of Immigration Appeals, Department of Justice, and on October 23, 1953 said Board dismissed plaintiff's appeal.

Following the hearing, and on September 24, 1958 this court filed its memorandum and order holding unconstitutional Section 401(j), and on October 21, 1958, findings of fact, conclusions of law and judgment of law were entered accordingly.

On a direct appeal to the Supreme Court of the United States, the cause was on April 18, 1960 again remanded to this court "with permission to the parties to amend the pleadings, if they so desire, to put in issue the question of collateral estoppel, and to obtain an adjudication upon it." 362 U.S. 384 at 387.

On or about June 30, 1960 plaintiff filed a second amended complaint raising the issue of collateral estoppel. The allegations of the second amended complaint in this respect are that in the year 1947 plaintiff was indicted for draft evasion, in violation of the Selective Service and Training Act of 1940; that plaintiff was adjudged guilty of the first count of the indictment and sentenced to imprisonment for one year and one day, and that under said judgment and commitment plaintiff was in fact imprisoned for the term therein provided. Copies of the indictment and of the judgment and commitment are attached as exhibits. In its answer the defendant admitted the foregoing allegations, except that it denied, for lack of information and belief, the allegation that plaintiff was in fact [fol. 38] imprisoned for the term provided under the judgment and commitment.

Following the filing of the amended pleadings, there was filed herein an amended trial stipulation, which is identical to the trial stipulation previously mentioned except there is added the fact that plaintiff resided in the United States from the date of his birth up to the time of his departure from the United States to Mexico in 1942, and that the action may be dismissed as to the defendant Argyle R. Mackey, the Commissioner of Immigration and Naturalization.

Under the amended trial stipulation there are no issues of fact to be tried, and the issues of law to be determined are posed in the following form:

Issues of Law

1. Is the defendant herein estopped by reason of the indictment and conviction of plaintiff for violation of Section 11 of the Selective Service and Training Act of 1940, as amended [U.S.C. Title 50 of Appendix, Section 311] from denying plaintiff is now a national and citizen of the United States?

2. Is Section 401(j) of the Nationality Act of 1940, as amended, unconstitutional, either on its face, or as applied to the plaintiff herein?

Pursuant to the order of the Supreme Court, a hearing was held on August 23, 1960. The plaintiff was repre-

sented by DiGiorgio & Davis, Thomas R Davis appearing. The defendant was represented by Laughlin E. Waters, United States Attorney, James R. Dooley, Assistant United States Attorney, appearing. Neither party offered the testimony of any witness. There was received in evidence as Plaintiff's Exhibits A and B respectively a copy of the indictment and a copy of the judgment and [fol. 39] commitment. Following oral arguments and the filing of additional legal memoranda the cause was submitted to the court for its decision upon the trial stipulation, the records and files and the above mentioned exhibits.

The indictment is in three counts. Count one, to which the plaintiff pleaded guilty, after alleging that plaintiff was a "male person within the class made subject to selective service" and that he had "registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137," charged that "on or about November 15, 1942, in violation of the provisions of said act and the regulations promulgated thereunder, the defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 1, 1946."

Count two of the indictment charged plaintiff with failure to report for induction on December 11, 1942, as ordered. Count three charged plaintiff with failure to keep the draft board advised of the address where mail would reach him.

The judgment and commitment dated November 23, 1947, after reciting that the defendant [plaintiff herein] had appeared in court without counsel, having been informed of his right to counsel and a jury trial and having waived the same, and having been convicted on his plea of guilty of the offense charged in the first count of the indictment, to-wit: "Having on or about November 15th 1942, knowingly departed from the United States to Mexico, for the purpose of evading service in the land

[fol. 40] or naval forces of the United States and having remained there until on or about November 1st 1946" it was ordered and adjudged that the defendant be "committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year and one day in an institution of the penitentiary type, on the first count." The judgment and commitment also states "It is further ordered that the second and third counts be dismissed, it appearing to the court that the offenses charged therein arose out of the same circumstances."

I will consider the issue of collateral estoppel.

It is the plaintiff's contention that while the Selective Service and Training Act of 1940, as amended, made male citizens and male persons residing in the United States, between certain ages, subject to military service, the Act did not apply to non-resident aliens; that plaintiff became a non-resident alien on September 27, 1944, the effective date of that Act, in accordance with the provisions thereof; and that when defendant in 1947 charged plaintiff with draft evasion between September 27, 1944 and November, 1946, such charge could be applicable only if plaintiff were then a citizen. From these premises plaintiff argues that when the trial court found plaintiff guilty of draft evasion during the period between September 27, 1944 and November, 1946, that the judgment of conviction necessarily included an adjudication of citizenship, and that such judgment brings into play the doctrine of collateral estoppel. In short, plaintiff contends that the judgment of conviction presupposed that plaintiff had not been denationalized under Section 401(j), and that therefore defendant is estopped to deny in this cause that plaintiff is a citizen or that he is entitled to the relief which he seeks.

It appears to be well settled that collateral estoppel [fol. 41] may arise from a criminal proceedings to estop a party in a subsequent civil action. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558. While the parties assume in their briefs that collateral estoppel may arise from a criminal proceedings prosecuted by the United States to estop the United States in a subsequent civil

action to which it is a party, I find it unnecessary to comment on such point.

Nothing appears in the record to indicate that the defendant asserted plaintiff's citizenship as a basis for his liability for induction, nor did the statute require any such assertion. The Selective Service and Training Act of 1940, as amended, provided in Section 3(a) that all male persons residing in the United States, as well as all male citizens, whether residing in the United States or not, were subject to the draft. 50 U.S.C. Appendix 303 [1940 edition, Supplement I]. In 1942 plaintiff was a male citizen within the class made subject to selective service, a class which comprised both citizens and non-citizens. Plaintiff, therefore, as a male person residing in the United States in 1942 was liable for induction irrespective of whether he was a citizen or simply a resident of the United States. Furthermore, it appears from the indictment that plaintiff was ordered to report for induction on December 11, 1942. The count of the indictment to which the plaintiff pleaded guilty necessarily included the failure to obey that order. In 1942, therefore, plaintiff as a male person within the class made subject to selective service was liable for induction whether he was a citizen or a resident alien. If either a male citizen or a male resident of the United States departed from the United States during war for the purpose of evading service, he would be subject to prosecution for draft [fol. 42] evasion upon his return to this country. The gist of the crime charged to which plaintiff pleaded guilty was evasion by leaving the country in 1942. In my view the further language of count one, reading "and did there [Mexico] remain until on or about November 1, 1946," is immaterial and is to be treated as mere surplusage. In his brief plaintiff states that he "invokes no mere technical defense. He relies on a determination by the original trial judge on the basis of which he actually suffered punishment. If the trial court had found that the extent of his offense was from 1942 to 1944, instead of 1942 to 1946, it seems an inevitable inference that the penalty imposed would have been mitigated accordingly." I find nothing in the record to support any inference that the

trial judge increased the punishment which would have otherwise been imposed absent the fact that plaintiff remained in Mexico after September 27, 1944. This is particularly true when considered in the light of the trial judge's statement in dismissing counts two and three, and the fact that the trial judge could have imposed punishment by "imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment."

It is my conclusion that the prior criminal proceeding against plaintiff did not necessarily or in actual fact make any determination as to plaintiff's citizenship and, therefore, the doctrine of collateral estoppel is not applicable.

In respect to the question posed "Is Section 401 (j) unconstitutional, either on its face or as applied to the plaintiff?" I reaffirm the views expressed in my memorandum and order of September 24, 1958, which followed the second hearing on July 10, 1958. In addition, following further study of the several views expressed by the members of the Supreme Court of the United States in *Trop* v. *Dulles*, 356 U.S. 86, and *Perez* v. *Brownell*, 356 U.S. 44, I desire to add the following paragraph:

The *Trop* case did not involve Section 401(j), but involved Section 401(g) of that Act, which provides that a "citizen shall lose his nationality "by deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by a court martial and as a result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces; * * *". The *Perez* case involved Section 401(e) of the Act, which provides that a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: " * * * Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. * * *." In addition to the views expressed in my memorandum and order of September 24, 1958, I construe Section 401(j), which provides for automatic divestiture of citizenship, as essentially penal in character and deprives the plaintiff of procedural due process. In my

view the requirements of procedural due process are not satisfied by the administrative hearing of the Immigration Service nor in this present proceedings.

Pursuant to the stipulation of the parties, the action may be dismissed as to the defendant Argyle R. Mackey, the Commissioner of Immigration and Naturalization.

The plaintiff is entitled to the relief sought. Counsel for the plaintiff is directed to prepare and lodge proposed findings of fact, conclusions of law and form of judgment consistent with the views herein expressed.

The Clerk of this Court is directed to forthwith mail [fol. 44] copies of this memorandum to all counsel.

Dated: September 22, 1960.

s Gilbert H. Jertberg
District Judge

[fol. 45] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF

vs.

WILLIAM P. ROGERS, Attorney General of the United States, DEFENDANT

FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT
Filed October 18, 1960—Entered October 19, 1960

The above entitled cause having come on regularly for hearing on the 23rd day of August, 1960, before the Honorable Gilbert H. Jertberg, Judge Presiding without a jury, the plaintiff being represented by his attorneys, Di Giorgio and Davis, by Thomas R. Davis, and the defendant being represented by his attorney, Laughlin E. Waters, United States Attorney, Richard A. Lavine and James R. Dooley, Assistant United States Attorneys, by James R. Dooley; and the facts having been submitted by written stipulation and written memoranda having been submitted, and documentary evidence having been submitted by the plaintiff and oral argument having been heard; and the Court having taken the cause under submission and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

[fol. 46] FINDINGS OF FACT

I

The plaintiff, Francisco Mendoza-Martinez, is a resident of the City of Delano, County of Kern, State of California, and is within the jurisdiction of this Court.

II

The defendant, William P. Rogers, is the duly appointed, qualified and acting Attorney General of the United States, and as such is the head of the Department of Justice.

III

Plaintiff was born in the United States on March 3, 1922, and thus was a citizen and national of the United States at birth.

IV

The father and mother of the plaintiff were at the time of the birth of the plaintiff citizens and nationals of Mexico; under the Constitution and Laws of Mexico plaintiff is now and ever since his birth has been a citizen of the Republic of Mexico by virtue of his parentage and without regard to his place of birth; the foregoing finding is intended to be solely and exclusively a recitation as to the law of Mexico according to its Constitution and Statutes and it is not intended to carry with it any other or broader connotation.

V

During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VI

Plaintiff had resided in the United States from the date of his birth up to the time of his departure from the United States as set forth in Finding of Fact V above.

[fol. 47]

VII

Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VIII

On June 23, 1947, plaintiff, upon his plea of guilty, was convicted in the United States District Court for the Southern District of California, Northern Division, for violation of Section 11 of the Selective Training and Service Act of 1940, as amended; plaintiff's Exhibits A and B, being respectively a copy of the indictment and of the Judgment and Commitment, are true and correct copies of the original documents.

IX

Plaintiff was sentenced to imprisonment for a period of one year and one day and thereafter served said sentence.

X

On February 3, 1953, a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the special inquiry officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

XI

Plaintiff appealed the decision of the special inquiry officer to the Board of Immigration Appeals, United States Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal

Conclusions of Law

I

This Court has jurisdiction over the subject matter of [fol. 48] the within action under the provisions of Section 360 (a) of the Immigration and Nationality Act, 66 Stat. 273, 8 U.S.C.A. Sec. 1503(a).

II

Argyle R. Mackey, The Commissioner of Immigration and Naturalization is not a proper party to the within action, and the action as to him should be dismissed.

III

The defendant is not estopped, by virtue of the criminal indictment and conviction of the plaintiff for draft evasion, or for any other reason, from asserting that the plaintiff has lost his United States nationality and citizenship under the terms and provisions of Section 401(j) of the Nationality Act of 1940, a 1944 Amendment.

IV

Section 401 (j) of the Nationality Act of 1940, a 1944 Amendment, under which defendant claims the plaintiff lost his United States nationality and citizenship, is unconstitutional, both on its face and as applied to the plaintiff herein.

V

The plaintiff is now, and ever since the date of his birth has been, a national and citizen of the United States; and judgment should be entered accordingly.

JUDGMENT

In accordance with the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED, AND DECREED:

1. That the within action be, and the same is hereby dismissed as to the defendant, Argyle R. Mackey, The Commissioner of Immigration and Naturalization, only;

2. That Section 401 (j) of the Nationality Act of 1940, a 1944 Amendment, is unconstitutional both on its [fol. 49] face and as applied to the plaintiff herein;

3. That the plaintiff is now, and ever since the date of his birth has been, a national and citizen of the United States.

DATED: This 18th day of October, 1960.

/s/ Gilbert H. Jertberg
Judge of the
United States District Court

[fol. 50] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed November 4, 1960

I. NOTICE IS HEREBY GIVEN that the above-named defendant appeals to the Supreme Court of the United States from the judgment of the District Court, entered October 19, 1960, declaring the plaintiff to be a citizen of the United States, on the ground that Section 401(j) of the Nationality Act of 1940, as amended, is unconstitutional.

This appeal is taken pursuant to 28 U.S.C. 1252.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Printed Transcript of Record as filed in the Court of Appeals for the Ninth Circuit in No. 14997, 1956 Term.

[fol. 51] 2. Opinion of the Court of Appeals for the Ninth Circuit dated November 2, 1956.

3. Mandate of the Supreme Court, dated April 7, 1958.

4. Trial stipulation submitted to the district court at the hearing held on July 10, 1958.

5. Memorandum and Order of the district court dated September 24, 1958.

6. Findings of Fact, Conclusions of Law and Judgment, entered October 21, 1958.

7. Mandate of the Supreme Court dated April 18, 1960.

8. Plaintiff's Second Amended Complaint including Indictment filed on June 11, 1947 and Judgment and Commitment entered on or about June 23, 1947.

9. Answer to Second Amended Complaint filed July 8, 1960.

10. Amended Trial Stipulation.

11. Memorandum of the district court dated September 22, 1960.

12. Findings of Fact, Conclusions of Law and Judgment entered October 19, 1960.

13. Indictment filed on June 11, 1957 and Judgment and Commitment entered on or about June 23, 1947 received in evidence as plaintiff's exhibits A and B respectively.

14. This Notice of Appeal.

III. The following question is presented by this appeal:

[fol. 52] Whether Congress had constitutional power to provide in Section 401(j) of the Nationality Act of 1940, as amended, that a United States national shall lose his United States nationality by departing from or remaining outside the jurisdiction of the United States in time of war or national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

DATED: This 3rd day of November, 1960.

LAUGHLIN E. WATERS
United States Attorney
RICHARD A. LAVINE
Assistant U. S. Attorney
Chief of Civil Division

/s/ James R. Dooley
Assistant U. S. Attorney
Attorneys for Defendants

[fol. 52a] AFFIDAVIT OF SERVICE
(Omitted in Printing)

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES

No. 566, October Term, 1960

WILLIAM P. ROGERS, Attorney General of the United States, APPELLANT

vs.

FRANCISCO MENDOZA-MARTINEZ

ORDER NOTING PROBABLE JURISDICTION—February 20, 1961

APPEAL from the United States District Court for the Southern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

[fol. 55] SUPREME COURT OF THE UNITED STATES

No. 566, October Term, 1960

WILLIAM P. ROGERS, Attorney General of the United States, APPELLANT

vs.

FRANCISCO MENDOZA-MARTINEZ

ORDER OF SUBSTITUTION—April 3, 1961

ON CONSIDERATION of the motion to substitute Robert F. Kennedy in the place of William P. Rogers as the party appellant in this case,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

[fol. 56] SUPREME COURT OF THE UNITED STATES

No. 566, October Term, 1960

ROBERT F. KENNEDY, Attorney General of the United States, APPELLANT

vs.

FRANCISCO MENDOZA-MARTINEZ

ORDER GRANTING MOTION TO USE RECORD IN No. 29, OCTOBER TERM, 1959—April 17, 1961

ON CONSIDERATION of the motion for leave to use the record in No. 29, October Term, 1959, in this case,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

☆ U. S. GOVERNMENT PRINTING OFFICE 1961 90520° 1144

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1960

No.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

v.

FRANCISCO MENDOZA-MARTINEZ

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the District Court holding Section 401(j) of the Nationality Act of 1940, as amended, unconstitutional, is set forth in the Appendix, *infra,* pp. 7–15. The court's findings of fact and conclusions of law are also set forth in the Appendix, *infra,* pp. 16–19.

JURISDICTION

The judgment of the District Court declaring petitioner to be a citizen of the United States, for the reason that Section 401(j) of the Nationality Act of 1940, as amended, is unconstitutional, was entered on October 19, 1960. Appendix, *infra,* p. 20. A notice of appeal to this Court was filed in the Dis-

trict Court on November 4, 1960. The jurisdiction of this Court to review on direct appeal the decision of a District Court holding an act of Congress unconstitutional is conferred by 28 U.S.C. 1252.

QUESTION PRESENTED

Whether Congress had the constitutional power to provide, as it did in Section 401(j) of the Nationality Act of 1940, for the expatriation of a native-born citizen who, in time of war, voluntarily remained outside the jurisdiction of the United States for the purpose of evading or avoiding service in the armed forces of the United States.

STATUTE INVOLVED

The Nationality Act of 1940 (54 Stat. 1137), as amended by the Acts of January 20, 1944 (58 Stat. 4), July 1, 1944 (58 Stat. 677), and September 27, 1944 (58 Stat. 746), provided in pertinent part:

> Section 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.[1]

[1] Now incorporated into Section 349 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U.S.C. 1481.

STATEMENT

On April 18, 1960, the Court remanded this case to the District Court to determine whether appellee's conviction for draft evasion on June 23, 1947, after the adoption of Section 401(j) of the Nationality Act of 1940, as amended, necessarily involved an adjudication that he was a citizen of the United States, thus foreclosing, under the doctrine of collateral estoppel, his denationalization (362 U.S. 384).[2] On remand, the District Court, after allowing the parties to amend their pleadings, considered this question. It found collateral estoppel inapplicable to this case, and therefore was compelled again to reach the constitutional issue; it adhered to its former decision that Section 401(j) was unconstitutional. Appendix, *infra*, pp. 10–15.

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[2] The prior history of the case is as follows:

On September 6, 1955, the District Court for the Southern District of California, Northern Division, issued a Memorandum and Order rejecting appellee's claim, brought under Section 503 of the Nationality Act of 1940, that he is a citizen of the United States since Section 401(j) is unconstitutional. In a *per curiam* opinion, rendered on November 2, 1956, the Court of Appeals for the Ninth Circuit affirmed (238 F. 2d 239). On December 12, 1956, a petition for a writ of certiorari was filed (No. 623, O.T. 1956) and on April 7, 1958, this Court (356 U.S. 258) granted the petition (No. 54, O.T. 1957), and vacated the judgment of the Ninth Circuit for reconsideration in the light of *Trop* v. *Dulles*, 356 U.S. 86. Upon reconsideration, the District Court entered a judgment holding Section 401(j) unconstitutional (October 20, 1958) and on March 9, 1959, this Court noted jurisdiction of the government's appeal (359 U.S. 933). The case was then briefed and argued on the issue of constitutionality. The Court raised the issue of collateral estoppel *sua sponte*, after argument.

The facts upon which this holding of unconstitutionality was based are substantially the same as those before the Court at the last term; these facts were stipulated by the parties and were again found by the district judge in his memorandum and order (Appendix, *infra*, pp. 8–10), and his findings of fact (Appendix *infra*, pp. 16–18), after the remand ordered in 362 U.S. 384.[3] They are as follows: That appellee was born in the United States on March 3, 1922, and was a citizen of the United States by birth; that he was also, and had been ever since birth, a citizen and national of Mexico under the laws of that country; that he resided in the United States continuously from his birth until 1942; that during 1942 he departed the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States; that he remained in Mexico continuously from 1942 until on or about November 1, 1946, for that sole purpose; that on June 23, 1947, upon his plea of guilty in the United States District Court for the Southern District of California, appellee was convicted of violating Section 11 of the Selective Service and Training Act of 1940, and was sentenced to imprisonment for a period of one year and a day, and served that sentence; that on February 3, 1953, appellee was served with a warrant of arrest on deportation proceedings; that a hearing was held on May 25, 1953, before a Special Inquiry Officer who, on September 11, 1953, ordered appellee deported from the United States as an alien; and that on October 23,

[3] No new evidence bearing on the issue of constitutionality was introduced at the hearing after the remand.

1953, the Board of Immigration Appeals dismissed appellee's appeal.

THE QUESTION IS SUBSTANTIAL

In its present posture, this case directly raises the issue of the validity of Section 401(j) of the Nationality Act of 1940, as to which the Court has twice granted certiorari for a hearing on the merits (*Gonzales* v. *Landon*, 349 U.S. 943, 350 U.S. 920; *Perez* v. *Brownell*, 352 U.S. 908, 356 U.S. 44) and noted probable jurisdiction in this case on the prior appeal (*Mackey* v. *Mendoza-Martinez*, 359 U.S. 933, 362 U.S. 384). The Court has four times heard argument on this question.[4] It is plain that the problem of whether Congress has constitutional power to provide for loss of nationality for leaving the country in order to evade military service during a period of war or national emergency still warrants resolution by this Court, and the issue is now posed in clearest form in this case. In addition, the same issue (as it involves the validity of Section 349(a)(10) of the Immigration and Nationality Act of 1952, the successor provision of Section 401(j) of the Nationality Act of 1940) is presented in the companion case of *Herter* v. *Cort*, in which the government has also noted an appeal to this Court and is simultaneously filing its jurisdictional statement. The considerations supporting the validity of the statute, and demonstrating that the question on the merits is substantial, are discussed in the government's brief on the merits on the prior appeal in this case (No. 29, Oct. Term 1959).

[4] In *Gonzales*, twice in *Perez*, and in the prior appeal in the instant case.

CONCLUSION

It is respectfully submitted that the Court should note jurisdiction of this appeal.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

DECEMBER 1960.

APPENDIX

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

No. 1314–ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF, *vs.* WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

MEMORANDUM AND ORDER

The above cause is before the court for the third time. On the 22nd day of September 1955, this court entered judgment which adjudged and decreed that plaintiff lost his United States citizenship and nationality through expatriation by remaining outside the jurisdiction of the United States after September 27, 1944, in time of war and during a period declared by the President of the United States to be a period of national emergency, for the purpose of evading and avoiding training and service in the land and naval forces of the United States. On April 7, 1957 the Supreme Court of the United States vacated the judgment, and remanded the cause "to the United States District Court for determination in light of *Trop* v. *Dulles,* ante, p. 86, decided March 31, 1958". 356 U.S. 258.

Pursuant to the order of the Supreme Court a hearing was held before this court on July 10, 1958.

At the hearing held on July 10, 1958, the only issue presented to the court for determination was an issue

of law which the parties posed as follows: Is Section 401(j) of the Nationality Act of 1940 (54 Stat. 1137) unconstitutional, either on its face or as applied to plaintiff? The issue of law to be determined was submitted to the court on a written trial stipulation wherein the parties stipulated:

1. That plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth;

2. Under the laws of the Republic of Mexico plaintiff was then and ever since his birth had been a citizen and national of the Republic of Mexico;

3. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the armed forces of the United States;

4. Plaintiff remained in Mexico continuously from some time during 1942 until on or about November 1, 1946, for the sole purpose of evading and avoiding training and service in the armed forces of the United States;

5. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940, and he was sentenced to imprisonment for a period of one year and one day;

6. On February 3, 1953, a warrant of arrest in deportation proceedings was served upon plaintiff. Pursuant to this warrant a deportation hearing was held on May 25, 1953, and on September 11, 1953, the special inquiry officer who presided at the hearing rendered his decision ordering that plaintiff be deported from the United States as an alien; and

7. Plaintiff appealed the decision of the special inquiry officer to the Board of Immigration Appeals,

Department of Justice, and on October 23, 1953 said Board dismissed plaintiff's appeal.

Following the hearing, and on September 24, 1958 this court filed its memorandum and order holding unconstitutional Section 401(j), and on October 21, 1958, findings of fact, conclusions of law and judgment of law were entered accordingly.

On a direct appeal to the Supreme Court of the United States, the cause was on April 18, 1960 again remanded to this court "with permission to the parties to amend the pleadings, if they so desire, to put in issue the question of collateral estoppel, and to obtain an adjudication upon it." 362 U.S. 384 at 387.

On or about June 30, 1960 plaintiff filed a second amended complaint raising the issue of collateral estoppel. The allegations of the second amended complaint in this respect are that in the year 1947 plaintiff was indicted for draft evasion, in violation of the Selective Service and Training Act of 1940; that plaintiff was adjudged guilty of the first count of the indictment and sentenced to imprisonment for one year and one day, and that under said judgment and commitment plaintiff was in fact imprisoned for the term therein provided. Copies of the indictment and of the judgment and commitment are attached as exhibits. In its answer the defendant admitted the foregoing allegations, except that it denied, for lack of information and belief, the allegation that plaintiff was in fact imprisoned for the term provided under the judgment and commitment.

Following the filing of the amended pleadings, there was filed herein an amended trial stipulation, which is identical to the trial stipulation previously mentioned except there is added the fact that plaintiff resided in the United States from the date of his birth up to the time of his departure from the United States to Mexico in 1947, (sic) and that the action may be dismissed as to the defendant Argyle R.

Mackey, the Commissioner of Immigration and Naturalization.

Under the amended trial stipulation there are no issues of fact to be tried, and the issues of law to be determined are posed in the following form:

ISSUES OF LAW

1. Is the defendant herein estopped by reason of the indictment and conviction of plaintiff for violation of Section 11 of the Selective Service and Training Act of 1940, as amended (U.S.C. Title 50 of Appendix, Section 311) from denying plaintiff is now a national and citizen of the United States?

2. Is Section 401(j) of the Nationality Act of 1940, as amended, unconstitutional, either on its face, or as applied to the plaintiff herein?

Pursuant to the order of the Supreme Court, a hearing was held on August 23, 1960. The plaintiff was represented by DiGiorgio & Davis, Thomas R. Davis appearing. The defendant was represented by Laughlin E. Waters, United States Attorney, James R. Rooley, Assistant United States Attorney, appearing. Neither party offered the testimony of any witness. There was received in evidence as Plaintiff's Exhibits A and B respectively a copy of the indictment and a copy of the judgment and commitment. Following oral arguments and the filing of additional legal memoranda the cause was submitted to the court for its decision upon the trial stipulation, the records and files and the above mentioned exhibits.

The indictment is in three counts. Count one, to which the plaintiff pleaded guilty, after alleging that plaintiff was a "male person within the class made subject to selective service" and that he had "registered as required by said act and the regulations pro-

mulgated thereunder and became a registrant of Local Board No. 137," charged that "on or about November 15, 1942, in violation of the provisions of said act and the regulations promulgated thereunder, the defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 1, 1946."

Count two of the indictment charged plaintiff with failure to report for induction on December 11, 1942, as ordered. Count three charged plaintiff with failure to keep the draft board advised of the address where mail would reach him.

The judgment and commitment dated November 23, 1947, after reciting that the defendant (plaintiff herein) had appeared in court without counsel, having been informed of his right to counsel and a jury trial and having waived the same, and having been convicted on his plea of guilty of the offense charged in the first count of the indictment, to-wit: "Having on or about November 15th 1942, knowingly departed from the United States to Mexico, for the purpose of evading service in the land or naval forces of the United States and having remained there until on or about November 1st 1946" it was ordered and adjudged that the defendant be "committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year and one day in an institution of the penitentiary type, on the first count." The judgment and commitment also states "It is further ordered that the second and third counts be dismissed, it appearing to the court that the offenses charged therein arose out of the same circumstances."

I will first consider the issue of collateral estoppel.

It is the plaintiff's contention that while the Selective Service and Training Act of 1940, as amended, made male citizens and male persons residing in the United States, between certain ages, subject to military service, the Act did not apply to non-resident aliens; that plaintiff became a non-resident alien on September 27, 1944, the effective date of that Act, in accordance with the provisions thereof; and that when defendant in 1947 charged plaintiff with draft evasion between September 27, 1944 and November, 1946, such charge could be applicable only if plaintiff were then a citizen. From these premises plaintiff argues that when the trial court found plaintiff guilty of draft evasion during the period between September 27, 1944 and November, 1946, that the judgment of conviction necessarily included an adjudication of citizenship, and that such judgment brings into play the doctrine of collateral estoppel. In short, plaintiff contends that the judgment of conviction presupposed that plaintiff had not been denationalized under Section 401(j), and that therefore defendant is estopped to deny in this cause that plaintiff is a citizen or that he is entitled to the relief which he seeks.

It appears to be well settled that collateral estoppel may arise from a criminal proceedings to estop a party in a subsequent civil action. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558. While the parties assume in their briefs that collateral estoppel may arise from a criminal proceedings prosecuted by the United States to estop the United States in a subsequent civil action to which it is a party, I find it unnecessary to comment on such point.

Nothing appears in the record to indicate that the defendant asserted plaintiff's citizenship as a basis for his liability for induction, nor did the statute require any such assertion. The Selective Service

and Training Act of 1940, as amended, provided in Section 3(a) that all male persons residing in the United States, as well as all male citizens, whether residing in the United States or not, were subject to the draft. 50 U.S.C. Appendix 303 (1940 edition, Supplement 1). In 1942 plaintiff was a male citizen within the class made subject to selective service, a class which comprised both citizens and non-citizens. Plaintiff, therefore, as a male person residing in the United States in 1942 was liable for induction irrespective of whether he was a citizen or simply a resident of the United States. Furthermore, it appears from the indictment that plaintiff was ordered to report for induction on December 11, 1942. The count of the indictment to which the plaintiff pleaded guilty necessarily included the failure to obey that order. In 1942, therefore, plaintiff as a male person within the class made subject to selective service was liable for induction whether he was a citizen or a resident alien. If either a male citizen or a male resident of the United States departed from the United States during war for the purpose of evading service, he would be subject to prosecution for draft evasion upon his return to this country. The gist of the crime charged to which plaintiff pleaded guilty was evasion by leaving the country in 1942. In my view the further language of count one, reading "and did there (Mexico) remain until on or about November 1, 1946," is immaterial and is to be treated as mere surplusage. In his brief plaintiff states that he "invokes no more technical defense. He relies on a determination by the original trial judge on the basis of which he actually suffered punishment. If the trial court had found that the extent of his offense was from 1942 to 1944, instead of 1942 to 1946, it seems an inevitable inference that the penalty imposed would have been mitigated accordingly." I

find nothing in the record to support any inference that the trial judge increased the punishment which would have otherwise been imposed absent the fact that plaintiff remained in Mexico after September 27, 1944. This is particularly true when considered in the light of the trial judge's statement in dismissing counts two and three, and the fact that the trial judge could have imposed punishment by "imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment."

It is my conclusion that the prior criminal proceedings against plaintiff did not necessarily or in actual fact make any determination as to plaintiff's citizenship and, therefore, the doctrine of collateral estoppel is not applicable.

In respect to the question posed "Is Section 401(j) unconstitutional, either on its face or as applied to the plaintiff?" I reaffirm the views expressed in my memorandum and order of September 24, 1958, which followed the second hearing on July 10, 1958. In addition, following further study of the several views expressed by the members of the Supreme Court of the United States in *Trop* v. *Dulles*, 356 U.S. 86, and *Perez* v. *Brownell*, 356 U.S. 44, I desire to add the following paragraph:

The *Trop* case did not involve Section 401(j), but involved Section 401(g) of that Act, which provides that a citizen shall lose his nationality "by deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by a court martial and as a result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces; * * *." The *Perez* case involved Section 401(e) of the Act, which provides that a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: "* * * Voting in a political elec-

tion in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. * * *" In addition to the views expressed in my memorandum and order of September 24, 1958, I construe Section 401(j), which provides for automatic divestiture of citizenship, as essentially penal in character and deprives the plaintiff of procedural due process. In my view the requirements of procedural due process are not satisfied by the administrative hearing of the Immigration Service nor in this present proceedings.

Pursuant to the stipulation of the parties, the action may be dismissed as to the defendant Argyle R. Mackey, the Commissioner of Immigration and Naturalization.

The plaintiff is entitled to the relief sought. Counsel for the plaintiff is directed to prepare and lodge proposed findings of fact, conclusions of law and form of judgment consistent with the views herein expressed.

The Clerk of this Court is directed to forthwith mail copies of this memorandum to all counsel.

Dated: September 22, 1960.

GILBERT H. JERTBERG,
District Judge.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

No. 1314–ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF, *vs.* WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The above entitled cause having come on regularly for hearing on the 23rd day of August 1960, before the Honorable Gilbert H. Jertberg, Judge Presiding without a jury, the plaintiff being represented by his attorneys, Di Giorgio and Davis, by Thomas R. Davis, and the defendant being represented by his attorney, Laughlin E. Waters, United States Attorney, Richard A. Lavine and James R. Dooley, Assistant United States Attorneys, by James R. Dooley; and the facts having been submitted by written stipulation and written memoranda having been submitted, and documentary evidence having been submitted by the plaintiff and oral argument having been heard; and the Court having taken the cause under submission and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

The plaintiff, Francisco Mendoza-Martinez, is a resident of the City of Delano, County of Kern, State of California, and is within the jurisdiction of this Court.

II

The defendant, William P. Rogers, is the duly appointed, qualified and acting Attorney General of the United States, and as such is the head of the Department of Justice.

III

Plaintiff was born in the United States on March 3, 1922, and thus was a citizen and national of the United States at birth.

IV

The father and mother of the plaintiff were at the time of the birth of the plaintiff citizens and nationals of Mexico; under the Constitution and Laws of Mexico plaintiff is now and ever since his birth has been a citizen of the Republic of Mexico by virtue of his parentage and without regard to his place of birth; the foregoing finding is intended to be solely and exclusively a recitation as to the law of Mexico according to its Constitution and Statutes and it is not intended to carry with it any other or broader connotation.

V

During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VI

Plaintiff had resided in the United States from the date of his birth up to the time of his departure from the United States as set forth in Finding of Fact V above.

VII

Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VIII

On June 23, 1947, plaintiff, upon his plea of guilty, was convicted in the United States District Court for the Southern District of California, Northern Division, for violation of Section 11 of the Selective Training and Service Act of 1940, as amended; plaintiff's Exhibits A and B, being respectively a copy of the indictment and of the Judgment and Commitment, are true and correct copies of the original documents.

IX

Plaintiff was sentenced to imprisonment for a period of one year and one day and thereafter served said sentence.

X

On February 3, 1953, a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportion hearing was held on May 25, 1953; and on September 11, 1953, the special inquiry officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

XI

Plaintiff appealed the decision of the special inquiry officer to the Board of Immigration Appeals, United States Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

CONCLUSIONS OF LAW

I

This Court has jurisdiction over the subject matter of the within action under the provisions of Section 360(a) of the Immigration and Nationality Act, 66 Stat. 273, 8 U.S.C.A. Sec. 1503(a).

II

Argyle R. Mackey, The Commissioner of Immigration and Naturalization is not a proper party to the within action, and the action as to him should be dismissed.

III

The defendant is not estopped, by virtue of the criminal indictment and conviction of the plaintiff for draft evasion, or for any other reason, from asserting that the plaintiff has lost his United States nationality and citizenship under the terms and provisions of Section 401(j) of the Nationality Act of 1940, a 1944 Amendment.

IV

Section 401(j) of the Nationality Act of 1940, a 1944 Amendment, under which defendant claims the plaintiff lost his United States nationality and citizenship, is unconstitutional, both on its face and as applied to the plaintiff herein.

V

The plaintiff is now, and ever since the date of his birth has been, a national and citizen of the United States; and judgment should be entered accordingly.

JUDGMENT

In accordance with the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED, AND DECREED:

1. That the within action be, and the same is hereby dismissed as to the defendant, Argyle R. Mackey, The Commissioner of Immigration and Naturalization, only;

2. That Section 401(j) of the Nationality Act of 1940, a 1944 Amendment, is unconstitutional both on its face and as applied to the plaintiff herein;

3. That the plaintiff is now, and ever since the date of his birth has been, a national and citizen of the United States.

Dated: This 18th day of October, 1960.

GILBERT H. JERTBERG,
Judge of the United States District Court.

U.S. GOVERNMENT PRINTING OFFICE: 1960

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 19

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT,

v.

FRANCISCO MENDOZA-MARTINEZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE APPELLANT

OPINION BELOW

The memorandum opinion of the district court dated September 22, 1960 (R. 37-44), holding that appellant is not estopped from denying that appellee is a national and citizen of the United States and affirming a prior holding (dated September 24, 1958) (R. 5-13) that Section 401(j) of the Nationality Act of 1940, as amended, is unconstitutional, is not reported.

JURISDICTION

The judgment of the district court was entered on September 22, 1960 (R. 37). Notice of appeal to this Court was filed in the district court on November 4, 1960 (R. 49), and probable jurisdiction was noted on February 20, 1961 (R. 51). The jurisdiction of this Court to review on direct appeal the decision of a district court holding an act of Congress unconstitutional is conferred by 28 U.S.C. 1252.

QUESTIONS PRESENTED

1. Whether the prior indictment and conviction of appellee for violating Section 11 of the Selective Service and Training Act of 1940, as amended, estops the government from denying, in this suit, that appellee is a national and citizen of the United States.

2. Whether Congress had the constitutional power to provide, as it did in Section 401(j) of the Nationality Act of 1940 for the expatriation of a native-born citizen who, in time of war, voluntarily remained outside the jurisdiction of the United States for the purpose of evading or avoiding service in the armed forces of the United States.

STATUTES INVOLVED

The Nationality Act of 1940 (54 Stat. 1137), as amended by the Acts of January 20, 1944 (58 Stat. 4), July 1, 1944 (58 Stat. 677) and September 27, 1944 (58 Stat. 746), provided in pertinent part:

> SEC. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *

(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

The Immigration and Nationality Act of 1952 (66 Stat. 163, 267-268, 8 U.S.C. 1481), provides in pertinent part:

SEC. 349. (a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

* * * * *

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

* * * * *

The Selective Service and Training Act of 1940, 54 Stat. 885, as amended, 55 Stat. 844, *et seq.*, provided in pertinent part:

> SEC. 2. Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.
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> * * * * * *
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> SEC. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any

person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *.

* * * * * *

SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly

hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

STATEMENT

1. This action was instituted by appellee in 1955, under Section 503 of the Nationality Act of 1940, as amended, for a declaration that he is a citizen of the United States; he placed his suit on the sole ground that Section 401(j) of the Nationality Act, under which he had been deemed by the administrative authorities to have lost his United States citizenship, was unconstitutional. No other claim was raised in the complaint. On September 6, 1955, the District Court for the Southern District of California, Northern Division, issued its Memorandum and Order rejecting appellee's con-

tention that Section 401(j) was invalid.[1] In a *per curiam* opinion of November 2, 1951, the Court of Appeals for the Ninth Circuit affirmed. *Mendoza-Martinez* v. *Mackey*, 238 F. 2d 239. Appellee filed a petition for a writ of certiorari on December 12, 1956 (No. 623, O.T. 1956), and on April 7, 1958, this Court granted the petition (then renumbered as No. 51, O. T. 1957), vacated the judgment of the Ninth Circuit, and remanded the case to the District Court for reconsideration in the light of the decision in *Trop* v. *Dulles*, 356 U.S. 86. See 356 U.S. 258.

2. Upon reconsideration in the District Court, the parties stipulated the facts as follows (R. 2-3): appellee was born in the United States on March 3, 1922, and was a citizen of the United States at birth; he is now and has been since birth also a citizen of the Republic of Mexico; in 1942, he departed from the United States and went to Mexico for the sole purpose of avoiding service in the armed forces of the United States, and remained in Mexico for that purpose until November 1946; he was convicted in the United States District Court for the Southern District of California on June 23, 1947, upon a plea of guilty, for violation of Section 11 of the Selective Service and Training Act of 1940, and sentenced to imprisonment for a period of one year and one day.[2]

On February 3, 1953, appellee was served with a warrant of arrest in deportation proceedings and after

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[1] Findings of fact and conclusions of law were filed on September 22, 1953.

[2] The indictment in that criminal proceeding is summarized and discussed in Point I of the Argument, *infra*, p. 18, *ff*.

a hearing was ordered deported from the United States as an alien. An appeal was dismissed by the Board of Immigration Appeals on October 23, 1953.

The District Court—finding that there was no issue of fact to be tried (R. 4) and that under the terms of Section 401(j) appellee had lost his nationality before his return to this country in 1946 (R. 7, 14-15)—held, in the light of *Trop* v. *Dulles*, *supra*, that Section 401(j) was beyond the power of Congress and could not affect appellee's citizenship. Appellee was granted the relief he sought (R. 5-13).

On direct appeal under 28 U.S.C. 1252, this Court, after oral argument, *sua sponte* raised the issue of possible collateral estoppel and remanded the cause to the District Court with permission to the parties to amend the pleadings to put in issue the question of whether the indictment and conviction of appellee, in 1947, collaterally estopped the appellants from now claiming that appellee had lost his United States nationality while in Mexico (R. 20). 362 U.S. 384.

3. On remand, appellee amended his complaint to allege, in addition to his claim that Section 401(j) was invalid, that "the government of the United States has admitted the fact of his United States citizenship by virtue of the indictment and judgment of conviction [referred to above] and is therefore collaterally estopped now to deny such citizenship" (R. 22). The government's answer to this amended complaint (R. 30-32) denied the averment of collateral estoppel (R. 31) and reasserted its defense that the statute was constitutional. The parties again stipulated (R. 33-35) the facts summarized above, p. 7, and included the indictment.

judgment, and commitment in appellee's criminal conviction (R. 35). No new evidence bearing on the issue of constitutionality was introduced, and it was again agreed that there were no issues of fact to be tried (R. 35). The two legal issues were agreed to be the question of collateral estoppel and the validity of Section 401(j) (R. 35-36).

In a Memorandum and Order of September 22, 1960, (R. 37-44), the District Court rejected appellee's claim of collateral estoppel, based on the argument that the Selective Service and Training Act, as amended, could have been applicable to him only if he were a citizen. Finding that there was nothing in the record to indicate that his liability for induction was based upon his United States citizenship, the court held that, since the Selective Service and Training Act applied to all male persons residing in the United States, appellee was liable for induction whether he was a United States citizen or only a resident; that, in either event, if he left the United States to avoid the draft, he was subject to prosecution upon his return; and that therefore the 1947 prosecution did not involve the issue of his nationality. Accordingly, the court ruled, the government was not estopped from now asserting that appellee had lost United States nationality under Section 401(j) while in Mexico (R. 37-43).

The court then reaffirmed its prior holding that Section 401(j) was unconstitutional (R. 43). It held further that the provision for automatic divestiture of citizenship was essentially penal in character and deprived appellee of procedural due process (R. 43-44).

Formal findings of fact, conclusions of law, and a

judgment carrying into effect the court's holdings were entered on October 19, 1960 (R. 45-48).

SUMMARY OF ARGUMENT

I

On the prior appeal, this Court remanded the case to the District Court to determine whether appellee's 1947 conviction for draft evasion estops the government from asserting, in the present suit, that he has lost his United States citizenship. 362 U.S. 384. In our view, the determination by the court below that the government is not estopped is clearly correct.

A. The 1947 conviction for evading the draft (on appellee's plea of guilty) was not based in any way upon his citizenship status after the enactment of Section 401(j) in 1944. In the first place, the Selective Training and Service Act of 1940, under which he was convicted, made all *residents* within the prescribed classes —including aliens—eligible for the draft, and the indictment in appellee's case did not refer to him as a citizen but simply as "a male person within the class made subject to selective service" who had registered and then departed the country in November 1942 to evade service. It was appellee's status as an American resident in 1942—not his status as an American citizen or national (at that or any other time)—which lay beneath his liability for service; since he was plainly a resident, citizenship was not in issue.

Secondly, the gravamen of appellee's criminal offense was his failure to report for induction in December 1942—prior to the adoption of Section 401(j) in September 1944—and his liability to answer for that

offense would continue even though he later gave up his American residence or lost his American citizenship. The count to which he pleaded guilty did refer to his remaining away until November 1946, but this reference to a period after September 1944 was an unnecessary averment having only a tangential connection with the crime of draft evasion in 1942, with which he was charged. In any event, even if appellee's criminal liability were premised on his evading service for the whole period from 1942 to 1946, his citizenship would not have been involved since, from all that appears, he continued as a resident and would have remained liable in that capacity.[3]

B. Since the matter of appellee's citizenship, either before or after the adoption of Section 401(j) in 1944, was not necessarily, nor in actual fact, determined by his draft evasion conviction in 1947, the doctrine of collateral estoppel does not bar the government from denying, in this suit involving a different cause of action, that he is a United States citizen. Cf. *Emich Motors* v. *General Motors*, 340 U.S. 558, 568-569.

II

Appellee admits that he went to Mexico (of which he is also a national), and remained there until after the end of the fighting in World War II, for the sole purpose of evading military service. He thus falls squarely under Section 401(j) of the Nationality Act of 1940, which decreed denationalization in such cir-

[3] There is no reason to believe that appellee's punishment of a year and a day was increased because he remained in Mexico after September 1944.

cumstances. The only remaining issue in the case is the constitutionality of that provision. We submit that it was a valid enactment, within the power of Congress.[4]

A. In a series of decisions this Court has established that Congress may, in appropriate circumstances, provide expatriation as the consequence of designated acts voluntarily performed by an American citizen, regardless of whether he subjectively intends to give up or repudiate his United States citizenship or is aware that he will lose American nationality by performing the act. *Mackenzie* v. *Hare*, 239 U.S. 299; *Savorgnan* v. *United States*, 338 U.S. 491; *Perez* v. *Brownell*, 356 U.S. 44. This principle was not rejected in *Trop* v. *Dulles*, 356 U.S. 86, which invalidated Section 401(g) of the 1940 Nationality Act (loss of nationality upon conviction for desertion). The majority of the Court made it clear that the *Perez* rule remained unimpaired, and that *Trop* was decided on considerations pertinent to that particular subsection.

B. Under the general *Perez* principle, Section 401(j) is sustainable as a necessary and proper means of effectuating the foreign affairs power, the war power, and the inherent power of the United States to retain its sovereignty and jurisdiction over its citizens.

1. The statute has a long history. A provision in effect from 1865 to 1940 prescribed forfeiture of "rights of citizenship" for those who left the district of registration *or the country* to evade the draft. It

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[4] The companion case of *Rusk* v. *Cort*, No. 20, involves the validity of the comparable provision in the Immigration and Nationality Act of 1952—Section 349(a)(10)—which is the same (with respect to the present cases) as Section 401(j).

was legislatively and administratively treated as a full expatriation statute. Section 401(j) was added to the Nationality Act in 1944 because draft evasion in World War II revealed the same need as had existed in the earlier emergencies.

2. Since Section 401(j) applies *only* to those draft evaders who leave the country, it has a direct relationship to foreign affairs and represents a reasonable Congressional exercise of the power over foreign affairs. American history teaches the international difficulties which can arise from the efforts of one country to compel or induce its citizens in another country to return to perform military service. The same type of problems could develop if the United States were to seek the fugitive draft-evader's return from the country to which he has fled. The difficulties would be multiplied if the evader were also a national of the country in which he sought refuge—as in the present case and most others under Section 401(j). On the other hand, by expatriating those who depart with draft-evasion as their purpose, Congress has eliminated at the outset any further claim this country could have to their services, and by the same token has reduced the danger and area of potential conflict with the nations to which they have gone.

3. Section 401(j) is also sustained by its close and direct relationship to the war power and the national defense. Unlike desertion, which carries the sanction of court-martial and imprisonment, no similar primary check exists to deter individuals who would otherwise flee this country to avoid fulfilling their military obligations. Draft-evaders outside the country

cannot be apprehended and imprisoned for their departure or failure to return. Only if they return to this country, after they have accomplished their purpose and avoided service in time of danger, would it be possible to enforce against them the criminal sanctions of the selective service laws. This would not aid in raising an army when it is needed, and Congress reasonably felt that, for the difficult task of raising an army in wartime, it needed the immediate deterrent represented by loss of nationality for evasion by flight.

4. Congress also has the right to decide that it will sever the allegiance of men who reject all authority, sovereignty, and jurisdiction of this country over them. The draft-evader who seeks a foreign refuge deliberately keeps himself beyond the reach of United States criminal sanctions designed to compel him to fulfill his high duty. He is repudiating not only his military obligation but his wider obligation as a citizen to submit to this nation's justice; he rejects all authority of the United States over him, not merely his duty to serve in a military capacity. Dissolution of his ties to the nation is not an arbitrary consequence to attach to this voluntary choice.

C. Section 401(j) does not violate the Due Process Clause or the Eighth Amendment. It does not impose any improper punishment.

1. Citizenship cannot be forfeited administratively under Section 401(j) in any final sense; a *de novo* judicial trial is available under Section 503 of the Nationality Act, a right of which appellee has availed himself. In that judicial trial, the government's burden is heavy, comparable to the burden in a criminal trial.

Gonzales v. *Landon*, 350 U.S. 920; *Nishikawa* v. *Dulles*, 356 U.S. 129. This careful procedure involves no denial of due process. Nor, as pointed out above (*supra*, p. 12), is there any denial of due process because appellee may not have known that he would expatriate himself by voluntarily leaving this country and remaining abroad in order to evade the draft.

2. The statute does not impose any punishment on appellee. More than the desertion provision involved in *Trop*, Section 401(j) is concerned with regulation of the future rather than with punishment for past conduct; it is directed toward the prevention of embroilments with foreign countries, and inducing and goading evaders to fulfill their military responsibilities; subject to a judicial determination of the facts, it simply ends the citizenship of those who substantially repudiate that status by rejecting all American jurisdiction and authority over them. The section has been interpreted, both administratively and judicially, in non-penal fashion so as to affect only those fugitives whose draft-evasion was the dominant and primary motivation of their flight abroad.

Punishment is not involved merely because Congress imposes a non-penal disability or disqualification, following specified criminal conduct. Civil regulations based on past conduct are not invalid, or transformed into punitive sanctions, where the legislators have a valid non-penal objective and do not intend to inflict punishment, even though some deterrence of criminal conduct may also ensue. Scarcely any civil consequence of statutes relating to licensing, damages, or the like, can avoid—or need avoid—incidental effects

of deterrence. Cf., *e.g.*, *Flemming* v. *Nestor*, 363 U.S. 603; *Hawker* v. *New York*, 170 U.S. 189; *Helvering* v. *Mitchell*, 303 U.S. 391; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Rex Trailer Co.* v. *United States*, 350 U.S. 148.

Even if punishment is thought to be imposed by Section 401(j), it is not an invalid or a cruel and unusual punishment. In appellee's case, statelessness is not involved, since he is a national of Mexico. Dual nationality seems also to be characteristic of the bulk of those to whom the section has been applied. And if a criminal trial is a prerequisite for punishment, that requirement is fulfilled here by appellee's prior conviction for draft evasion.

ARGUMENT

Under its policy of avoiding serious constitutional issues unless absolutely necessary for determination of the case before it (see, *e.g.*, *Spector Motor Service Inc.* v. *McLaughlin*, 323 U.S. 101, 105; *Boynton* v. *Virginia*, 364 U.S. 454), the Court remanded this case to the district court with permission to the parties to raise the issue of whether the United States, by reason of its 1947 prosecution of appellee under the Selective Service and Training Act, is now estopped from denying that he is a United States citizen. We believe that the ruling of the district court that the government is not estopped is plainly correct. Since the issue is a non-constitutional one, we discuss that question first, even though the government prevailed on the point in the court below. Then, since, in our view, the constitutional issue must now be met in this case, we set out anew the considerations which we believe support the

constitutionality of Section 101(j) of the Nationality Act of 1940.[5]

I

Appellee's 1947 Conviction for Draft Evasion Does Not Estop the Government From Denying That He Is a Citizen of the United States.

Finding that "[t]he issue of collateral estoppel is a question that clouds the underlying issue of constitutionality", this Court, when the case was before it in the October Term 1959, remanded it to the district court to afford the parties an opportunity to litigate that issue and obtain its adjudication. *Mackey* v. *Mendoza-Martinez*, 362 U.S. 384, 387.[6] Pursuant to the order of remand, the issue was raised (R. 21-23), briefed by the parties, and considered by the court below. *Supra*, pp. 8-9. That court found "that the prior criminal proceedings against [appellee] did not necessarily or in actual fact make any determination as to [appellee's] citizenship and, therefore, the doctrine of collateral estoppel is not applicable" (R. 41-43). As we now show, this determination was entirely correct. The doctrine of collateral estoppel is applicable only to facts actually put in issue—not to those which merely

[5] This constitutional issue has previously been briefed and argued before this Court four times: in *Gonzales* v. *Landon*, 350 U.S. 920, where the Court found it unnecessary to reach the question since it ruled that there was no clear and convincing evidence that the claimant had remained outside the country to avoid military service; twice in *Perez* v. *Brownell*, 356 U.S. 44, where the issue was not reached since loss of nationality was found to rest on the fact that the claimant had voted in a foreign election; and once before in this litigation, 362 U.S. 384.

[6] The Court raised the issue *sua sponte* after oral argument, requesting that the parties submit memoranda on the question. See Supplemental Memorandum for Appellants, No. 29, O.T. 1959.

might have been litigated. Appellee's citizenship after the enactment of Section 401(j) of the Nationality Act (in September 1944) was not a necessary issue nor was it put in issue in the prosecution for draft evasion.

A. *Appellee's conviction for draft evasion in 1947 was not premised in any way upon his citizenship status after the enactment of Section 401(j) of the Nationality Act in 1944.*

1. On June 11, 1947, a three-count indictment was returned in the District Court for the Southern District of California charging appellee with draft evasion, in violation of Section 11 of the Selective Service Act of 1940, 54 Stat. 885, as amended, 55 Stat. 844, *et seq.* (R. 24-26, 35; *supra*, pp. 7, 8-9). The first count of the indictment (R. 24-25), the one to which appellee pleaded guilty (R. 27-28), first alleged that appellee was "a male person within the class made subject to selective service", and that he had registered as required by law, and then charged that:

> [O]n or about November 15, 1942, in violation of the provisions of said act and the regulations promulgated thereunder, the defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 4, 1946.

Count two charged appellee with failure to report for induction on December 11, 1942, as ordered (R. 25).

Count three charged that appellee failed to keep his draft board advised where mail would reach him (R. 25-26).

District Judge Yankwich, in sentencing appellee to imprisonment for a year and a day upon his plea of guilty to count one, observed (R. 27-28):

> It Is Further Ordered that the second and third counts be dismissed, it appearing to the court that the offenses charged therein arose out of the same circumstances.

2. The prosecution was thus centered upon appellee's evasion of his liability for induction, which in turn was based on his status in the last months of 1942. He was "a male person within the class made subject to selective service", a class which comprised both citizens and non-citizens. The Selective Training and Service Act of 1940, 54 Stat. 885, as amended, December 20, 1941, 55 Stat. 844, provided in Section 3(a) that all male persons residing in the United States, as well as all male citizens whether residing in the United States or not, were subject to the draft (see *supra*, p. 4). Appellee, as a male person residing in the United States who was (in 1942) of the prescribed age, was liable for induction, regardless of whether he happened to be or continued to be a citizen of the United States. At no time in the prosecution did the government assert appellee's citizenship as a basis, however remotely, for his liability for induction into the armed services; nor did the statute require such an assertion. As a resident of the United States, appellee was in the statutory class made eligible for military training and serv-

ice, completely apart from his citizenship status. Cf. *McGrath* v. *Kristensen*, 340 U.S. 162, 171-174.

3. Moreover, as appears from the dismissed second count together with Judge Yankwich's notation (quoted *supra*, p. 19), appellee was ordered to report for induction on December 11, 1942, and the charge in the first count, of evasion of service, would necessarily encompass failure to obey that order. As a result of the issuance of the order to report for induction, appellee's potential liability as a member of the statutory class had ripened into an actual liability. He was thereafter criminally liable for failure to obey this order to report, and he could not cast off this criminal liability, or be relieved of it, by a change of status after the date of enactment of Section 401(j) in 1944. A resident alien, who was liable for induction and absented himself from the United States during time of war, would be subject to prosecution for draft evasion upon his return to this country. Obviously, a citizen who departed to evade the draft and returned as an alien is in no better position. The critical factor is that both citizens and non-citizens *who were liable for induction prior to departing* remained subject to prosecution even while abroad or after their return. In short, a change in status, even if effective for the future, would not operate retroactively to erase appellee's criminal liability for acts already committed with regard to the previously issued order to report; nor would such a change in status for the future have any effect on that prosecution or be involved in it.

4. The count to which appellee pleaded guilty did also allege that he remained away until November 1,

1946, *i.e.*, after September 27, 1944 (the date of enactment of Section 401(j)).[7] However, as the allegations of that count make clear (*see supra*, p. 18), the gist of the crime charged was evasion by leaving the country in 1942. Appellee's action in remaining abroad for four years was merely a continuation of this offense, and the reference to the termination date of his stay abroad could be treated as mere surplusage, if necessary, at least to the extent that it charged remaining abroad after the date of divestiture of appellee's citizenship. Indeed, the charge in the indictment would have been made out by proof of departure without any proof of remaining abroad at all, much less proof of a four year stay. Appellee did not raise any defense of limitations to the 1947 prosecution. At that time, the period of limitations was three years (18 U.S.C. (1946 ed.) 582), but it would be tolled for a person fleeing from justice (18 U.S.C. (1946 ed.) 583, now 18 U.S.C. 3290). Even if only the three-year period applied to appellee's case without enlargement because he fled the country, the indictment in April 1947 would cover a time (within the three-year period) which antedated the adoption of Section 401(j) on September 27, 1944, *i.e.*, the period between April 1944 and September 27, 1944. No one claims that he had lost his United States nationality during that period.

There is no support for appellee's claim that the

[7] The government contends that appellee was expatriated after the enactment of section 401(j) in 1944. A return during the conduct of hostilities might have weighed heavily in his favor, at least as an evidentiary matter, on the requisite intent or motive required by the statute. See *infra*, pp. 59-61.

period of time he remained abroad inevitably influenced the penalty imposed. As the court below observed, there is "nothing in the record to support any inference that the trial judge increased the punishment which would have otherwise been imposed absent the fact that [appellee] remained in Mexico after September 27, 1944" (R. 42-43). Appellee was sentenced to a year and a day on the first count, the second and third counts having been dismissed, although the maximum punishment which could have been imposed upon him was five years imprisonment and or a $10,000 fine.[8]

As both a practical and legal matter, therefore, appellee's status after the date of enactment or application to him of Section 401(j) was in no way involved

[8] As revealed by the following table, appellee's sentence is about average for draft evasion convictions during the period 1940-1946 (see Enforcement of the Selective Service Law, Special Monograph No. 14 (1950), p. 93):

Table No. 11. All convictions, excluding professed religious or conscientious objectors convicted, by types of sentences from Oct. 16, 1940, to June 30, 1946

Type of sentence	Oct. 16, 1940, to June 30, 1942	July 1, 1942, to June 30, 1943	July 1, 1943, to June 30, 1944	July 1, 1944, to June 30, 1945	July 1, 1945, to June 30, 1946	Total
Fine only	18	114	31	21	24	208
Probation	422	809	696	444	236	2,607
1 month or less	130	136	124	68	59	517
More than 1 month to and including 6 months	265	277	194	145	177	1,058
More than 6 months to and including 1 year and 1 day	223	304	271	221	216	1,235
More than 1 year and 1 day to and including 2 years	267	372	451	468	300	1,858
More than 2 years to and including 3 years	142	329	511	397	147	1,526
More than 3 years to and including 4 years	31	86	91	104	26	338
More than 4 years to and including 5 years	30	89	94	89	17	319
More than 5 years		1	1	4		6
Total	1,528	2,517	2,464	1,961	1,202	9,672

in the criminal prosecution, since no part of his conduct after that date was an element of the crime with which he was charged.

5. Furthermore, changes in the citizenship status of individuals liable to induction were in many cases of no relevance to the continued application of the selective service laws to such persons, since residence was also a premise for liability to service. As we have pointed out (*supra*, pp. 19-20), the jurisdiction of this country's laws over such persons was not based solely upon the tie of citizenship, but also upon residence. Cf. *McGrath* v. *Kristensen*, 340 U.S. 162, 171-174. For instance, aliens abroad, including alien draft evaders, who still claimed residence in this country would continue to be subject to selective service even while they remained abroad.

In sum, appellee's citizenship (past or present) would not necessarily be involved at all in the charges against him in the 1947 criminal prosecution and conviction; his citizenship was not in fact involved in view of his plea of guilty; and his citizenship after September 27, 1944 (the date of enactment of Section 401(j)) was certainly not involved. Accordingly, the 1947 judgment of conviction was not premised in any respect upon his citizenship status after September 27, 1944.

B. *Since the matter of appellee's citizenship, either before or after the adoption of Section 401(j), was not necessarily, nor in fact, determined by his conviction for draft evasion, the doctrine of collateral estoppel does not bar the government from denying that appellee is a citizen of the United States.*

Collateral estoppel, an aspect of the broader doc-

trine of *res judicata*, is premised upon the assumption that the precise issue in question has necessarily, or in fact, been litigated and decided in a prior proceeding on a different cause of action between the same parties. See *e.g.*, *Packet Co.* v. *Sickles*, 5 Wall. 580, 592; *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353, 367; *Fayerweather* v. *Ritch*, 195 U.S. 276, 307; *Frank* v. *Mangum*, 237 U.S. 309, 333-334; *Emich Motors* v. *General Motors*, 340 U.S. 558, 568-569; *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 90-91, 99 (fn. 6); *Yates* v. *United States*, 354 U.S. 298, 336; *Hoag* v. *New Jersey*, 356 U.S. 464, 470. As the principle has generally been defined: "[w]here a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action * * *". Restatement, *Judgments*, § 68(1).

Unlike the doctrine of *res judicata* from which it derives, collateral estoppel renders the prior judgment conclusive, not as to all issues which could have been tendered and resolved, but only as to those matters directly put in issue and actually litigated. *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353; *Baltimore S. S. Co.* v. *Phillips*, 274 U.S. 316, 319; *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 671.[9]

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[9] As this Court, in the leading case of *Cromwell* v. *County of Sac*, *supra*, at 352-353, articulated the distinction between the use of a former adjudication as an absolute bar to a second action (*res judicata*), and its use to bar relitigation on the same issue in a second and different cause of action (collateral estoppel):

> * * * there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel

In the instant case, therefore, where there is no identity between the causes of action and thus no basis for the application of *res judicata*, the government would be estopped from denying that appellee is a citizen only if that issue was "distinctly put in issue and directly determined" in the prior criminal conviction. *Frank* v. *Mangum*, 237 U.S. 304, 334; *Emich Motors* v. *General Motors*, 340 U.S. 558, 569. But, as we have discussed (*supra*, pp. 18-23), the judgment of conviction for draft evasion was not based upon a resolution of appellee's citizenship status at all—and certainly not after the point in time when Section 401(j) would apply to divest him of that citizenship. Hence even if this Court were to conclude that the judgment of conviction might somehow have involved appellee's citizenship after September 27, 1944, this would not suffice to bring into play the doctrine of collateral estoppel, since that issue was not "distinctly put in issue and directly determined" by the prior proceeding.

The net of it is that appellee's 1947 conviction has no

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in another action between the same parties upon a different claim or cause of action.

In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand but as to any other admissible matter which might have been offered for that purpose.

* * * * *

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

effect on the issue of constitutionality in this case. It does represent a conclusive adjudication that he departed from and remained outside the United States to avoid liability for service; but his liability to prosecution for such conduct had fully ripened before the statute providing for expatriation was enacted in September 1944, and his prosecution for that offense is in no way inconsistent with the claim that he lost United States citizenship by continuing to remain outside the United States, during wartime, after September 1944.

II

Section 401(j) of the Nationality Act Is Constitutional

Section 401(j) decreed loss of United States nationality as a consequence of leaving the jurisdiction of the United States, or remaining outside it, during time of war or national emergency, for the purpose of avoiding service and training under the selective service laws.[10]

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[10] The provision is now embodied in Section 349(a)(10) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1481(a)(10). When it was included in the 1952 Act (enacted June 27, 1952, c. 477, title III, c. § 349, 66 Stat. 267), Congress added a presumption "that the departure from or absence from the United States was for the purpose of evading or avoiding training and service" in the armed forces, whenever it was shown that there was a "failure to comply with any provision of any compulsory service laws of the United States * * *." This presumption has been deemed by the Immigration and Naturalization Service not to be retroactive (Matter of F. —— M. ——, 6 I. & N. Dec. 379), and in any event does not affect this case because the facts were stipulated in the District Court.

The constitutionality of the substantive provisions of Section 349(a)(10) of the 1952 Act, but not of the presumption, is before the Court in *Rusk* v. *Cort*, No. 20. We are briefing in this case the basic issue of constitutionality raised in both cases, discussing in *Cort* only the aspects which are directly applicable to the facts there presented.

If, as we have shown in Point I, the government is not estopped to assert that the statute applies to appellee, there is no issue of fact in this case since appellee admitted by stipulation that he left the United States in 1942 solely for this purpose, and that he remained in Mexico subsequent to the effective date of Section 401(j) (September 27, 1944) until after the end of the fighting in World War II, solely for the same purpose. *Supra*, pp. 7-9.

It is our contention that the statute was within the power of Congress, as delineated by the decisions of this Court, in that it is a necessary and proper means of effectuating the express powers of Congress to wage war, to raise armies, and to provide for the common defense; within the implied power to enact legislation for the effective regulation of foreign affairs; and within the inherent powers of sovereignty. The statute satisfies the requirements of due process because a judicial determination is provided, in which a heavy burden of proof is cast upon the government. Finally, the statute does not apply any penal sanction; it is not punitive or vindictive in conception or application. It was enacted prospectively, with a view to regulating future conduct, rather than as an attempt to impose additional punishment upon one already chastised.

A. *The Constitution permits Congress to specify, in implementing its express and implied powers as well as the inherent powers of national sovereignty, acts which shall result in divestiture of citizenship, regardless of the subjective intent of the individual or of his aware-*

ness that he will lose his nationality by voluntarily performing the act.

1. The Constitution of the United States was, until the ratification of the Fourteenth Amendment, silent with respect to the methods by which individuals acceded to or lost United States citizenship, except for the provision that the federal government should provide for naturalization. Article I, Sec. 8, cl. 4. The Fourteenth Amendment referred to two methods by which citizenship is acquired—birth within the jurisdiction of the United States and naturalization. But at the time of the ratification of the amendment, a federal statute conferred citizenship upon children born abroad if their fathers were citizens of the United States who had previously resided in the United States; it also provided that women married to citizens of the United States were citizens. Thus, citizenship both by descent and by marriage, neither of which is specified in the Constitution, were permitted at the time of the ratification of the Amendment. Act of February 10, 1855, 10 Stat. 604, Rev. Stat. 1993; see *Weedin* v. *Chin Bow*, 274 U.S. 657. The acquisition of citizenship by descent continues to be permitted by Congress. 66 Stat. 235, 8 U.S.C. 1401.

The Constitution is still silent with respect to the means by which individuals may divest themselves of citizenship. Nonetheless, this country has long accepted the concept that an individual may divest himself of his original citizenship. On the day following the announcement of the ratification of the Fourteenth Amendment, the Fortieth Congress declared that "the right of expatriation is a national and in-

herent right of all people" and that any act of officers of the United States impairing that right was inconsistent with the policy of the United States. Act of July 27, 1868, 15 Stat. 223. See also *Reynolds* v. *Haskins*, 8 F.2d 473 (C.A. 8); *Charles Green's Son* v. *Salas*, 31 Fed. 106 (S.D.Ga.); Hay, *A Treatise on Expatriation* (1814). The United States rejected the principle of indefeasible allegiance in favor of the doctrine of the power of individuals to divest themselves of allegiance to the country of their original nationality.

The power of Congress to enact expatriation statutes, incidental to the exercise of its express powers, or in proper cases as an inherent attribute of sovereignty, has also been established by the decisions of this Court. In *Mackenzie* v. *Hare*, 239 U.S. 299, decided in 1915, the Court upheld the validity of a statute making marriage to a foreigner operative to suspend the American citizenship of the wife during coverture. It was contended that the statute must fall in the absence of an express constitutional grant. The Court answered (239 U.S. at 311):

> * * * But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. * * *

To the objection that this was to allow Congress the power to deem any act a renunciation of citizenship, the Court said (239 U.S. at 312):

> * * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relationship lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected.

In *Savorgnan* v. *United States*, 338 U.S. 491, decided in 1950, a woman who was a native-born citizen of the United States, while still within the United States, signed an oath of allegiance to the King of Italy in order to marry an Italian citizen. She subsequently went to live in Italy with her husband, but the trial court found that she had no intention of endangering her United States citizenship. This Court said, in affirming the holding of the court of appeals that Mrs. Savorgnan had expatriated herself (pp. 499-500):

> The petitioner's principal contention is that she did not intend to give up her American citizenship, although she applied for and accepted Italian

> citizenship, and that her intent should prevail. However, the acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.

In 1958, *Perez* v. *Brownell*, 356 U.S. 44, held that Congress did not exceed the scope of its authorized powers in enacting that one who voted in a foreign election should thereby lose his American nationality. The Court stated that, for expatriation legislation, the underlying principle was whether a rational nexus existed between the content of a specific power in Congress and the action of the Congress in carrying that power into execution by withdrawing citizenship. It held that the withdrawal of citizenship could be reasonably related to the regulation of foreign affairs (356 U.S. at 58, 60-61), and that loss of nationality for voting abroad was so related (356 U.S. at 60-61, 62). The Court dismissed the argument that the person must actually have intended to give up his citizenship (p. 61):

> Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily. * * * But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so.

Referring to the *Mackenzie* and *Savorgnan* cases, the Court went on to state (456 U.S. at 61):

> * * * Those two cases meant nothing—indeed, they are deceptive—if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent. * * *

2. In *Trop* v. *Dulles*, 356 U.S. 86, decided the same day as *Perez* v. *Brownell*, four members of the Court (speaking through the Chief Justice) held that to deprive an American citizen of his nationality for desertion whenever he had been convicted by court-martial and not subsequently reinstated by the military authorities—under Section 401(g) of the Nationality Act of 1940—was a cruel and unusual punishment in contravention of the Eighth Amendment. Mr. Justice Brennan's concurring opinion found no sufficient rational nexus between the war power or the foreign affairs power and the attempt by Congress to denationalize for desertion. He thought Section 401(g) too indirectly and remotely connected with the war powers to sustain its validity; and he noted that the provision was indiscriminately applicable to all kinds of conduct which amounted technically to the crime of desertion (whether the infraction occurred in this country or abroad) that it was essentially penal in nature and as such generally ineffectual, and that it was less effective than alternative sanctions not open to constitutional objection. 356 U.S. at 105-114. But it was made quite clear that the majority of the Court did not withdraw from the conclusion in *Perez* that

the government can, in proper circumstances, divest a man of his citizenship involuntarily. See the opinion of the Chief Justice in *Trop*, 356 U.S. at 93; Mr. Justice Whittaker's memorandum in *Perez*, 356 U.S. at 84; and Mr. Justice Brennan's concurring opinion in *Trop*, 356 U.S. at 105.[11]

3. The ultimate conclusions to be drawn from the holdings of the *Mackenzie*, *Savorgnan*, *Perez*, and *Trop* cases with respect to the power of Congress to decree loss of nationality are, we believe, these:

(1) Congress may decree loss of nationality as an incident to its control over foreign affairs on a ground which is reasonably necessary to the regulation of foreign affairs.

(2) Congress may decree loss of nationality under the war powers where the necessity for that sanction in the exercise of those powers is clear and direct.

(3) Congress may decree loss of nationality, under the sovereign powers of the United States as a government, where the individual's act may reasonably be found incompatible with continued allegiance to this country.

B. *Section 401(j) is a necessary and proper means of effectuating the foreign affairs power and the war*

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[11] Since the principle has now been established by the Court, we do not repeat the detailed arguments made in our briefs in *Perez*, *Trop*, *Savorgnan*, and other cases, in support of such Congressional power. See the Brief for the Respondent in *Perez*, No. 44, Oct. Term 1957 (No. 572, Oct. Term 1956), at pp. 10, *et seq.*; and the Supplemental Brief for the Respondents on Reargument in the *Perez*, *Nishikawa*, and *Trop* cases, Nos. 44, 19, and 70, Oct. Term 1957, at pp. 2, *et seq.*

power, as well as an appropriate exercise of the powers of sovereignty inherent in the United States.

Section 401(j) of the Nationality Act of 1940, and its successor statute, Section 349(a)(10) of the Immigration and Nationality Act of 1952, are Congressional responses to the felt need to deal with certain problems in the field of national defense, in our relations with foreign governments, and in vindicating the country's inherent right of sovereignty.[12]

1. *The History of the Statute*

a. Section 401(j) stems initially from Section 21 of the Act of March 3, 1865, 13 Stat. 490, providing for forfeiture of the rights of citizenship of enrolled draftees who departed from their districts or from the United States with intent to avoid military service (as well as deserters from the armed forces)—with mitigating provisions for those who returned before a certain date.[13] In 1912, this 1865 statute was amended

[12] It is clear that the *Perez* and *Trop* decisions did not include any ruling, express or implied, on Section 401(j). The majority opinion in *Perez* explicitly left open the "important question" of the constitutionality of Section 401(j). 356 U.S. at 62. As for *Trop*, two of the five justices constituting the majority indicated that they were not passing on the validity of Section 401(j); the memorandum of Mr. Justice Whittaker in the *Perez* case states that he neither expresses nor implies any views upon that provision (356 U.S. at 85), and Mr. Justice Brennan's opinion in the *Trop* case indicates that he was not passing on the validity of the section. See 356 U.S. at 110, esp. fn. 7.

[13] "• • • [A]ll persons who have deserted the military or naval services of the United States, who shall not return to said service, or report themselves to a provost-marshal within sixty days after the proclamation hereinafter mentioned, *shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens;* and such deserters shall

to make it inapplicable in time of peace (Act of August 22, 1912, 37 Stat. 356), and it remained in effect until repealed by Section 504 of the Nationality Act of 1940 (54 Stat. 1172).[11] In our view, the 1865 Act, as originally enacted and as amended in 1912, was a true expatriation statute—withdrawing citizenship and nationality—although it referred to the "rights" of citizenship. See the discussion in the Appendix, *infra*, pp. 65-71.

b. After the 1865 Act was repealed by the 1940 Nationality Act, there was no legislation on the books dealing with expatriation for evading the draft by leaving the country. Section 401(j) was added to the 1940 Act in 1944, at the suggestion of Attorney General Biddle, in order to meet a need that arose after the institution of the draft in World War II. H. Rep. No. 1229, 78th Cong., 2d Sess., which accompanied the bill resulting in Section 401(j), spells out the circumstances, at pp. 1-2:

> It is, of course, not known how many citizens or aliens have left the United States for the purpose

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be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof; and all persons who shall hereafter desert the military or naval service, *and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section.* * * *" (Emphasis added.)

[11] Section 401(g) of the 1940 Act—invalidated in *Trop*—provided for loss of nationality by those deserting the armed forces in time of war (54 Stat. 1169). This provision is apparently the reason for the total repeal of the 1865 Act which dealt both with deserters *and* with draft evaders. Provision with respect to draft evaders was resumed in 1944, see the text *infra*.

> of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war.

And Attorney General Biddle's letter to the Congress stated (H. Rep. No. 1229, at pp. 2-3):

> Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any of the existing grounds.[15]

A representative of the State Department appeared

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[15] The Attorney General's letter also said, in part:

"The files of this Department disclose that at the present time there are many citizens of the United States who have left this country for the purpose of escaping service in the armed forces. While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that in addition they should lose their United States citizenship. * * *

"* * * Any person who may be deemed to have become expatriated by operation of the foregoing provision, would be entitled to have his status determined by the courts pursuant to the above-mentioned section of the Nationality Act of 1940.

"Adequate precedent exists for the suggested legislation in that during the First World War a statute was in force which provided for the expatriation of any person who went beyond the limits of the United States with intent to avoid any draft into the military or naval service (37 Stat. 356). * * *"

before the Committee and indicated that that agency had no objections to the proposal (H. Rep. No. 1229, *supra*, p. 2).

The bill was passed unanimously by the House (90 Cong. Rec. 3261-3263), favorably and unanimously reported by the Senate Committee (S. Rep. No. 1075, 78th Cong., 2d Sess.), and then passed unanimously by the Senate (90 Cong. Rec. 7628-7629). The House accepted a technical Senate amendment (90 Cong. Rec. 7725-7726), and the bill became law on September 27, 1944.[16]

2. *The Foreign Affairs Power*

Unlike Section 401(g), involved in *Trop*, Section 401(j) affects *only* draft-evaders who remove themselves from the United States. It is limited to those "who flee to another land" (see Mr. Justice Brennan, commenting on Section 401(g) in *Trop*, 356 U.S. at 107), and does not apply to draft-evaders who remain within this country. As a result, like Section 401(e) (the foreign-voting provision sustained in *Perez*), subsection (j) has a direct relationship to foreign affairs—a sphere of activity in which Congress has an especially large measure of power. See, e.g., *Burnet* v. *Brooks*, 288 U.S. 378, 396.

a. A draft-evader who leaves or remains outside this country to avoid military service can easily cause

[16] H. Rep. No. 1229, *supra*, p. 2, makes it clear that—unlike the 1865 Act—no court conviction would be necessary for expatriation under Section 401(j). First, there would be an administrative decision and, then, the individual would have access to the courts under the declaratory judgment procedure or, if necessary, by way of habeas corpus. See the discussion, *infra*, pp. 51 *ff.*

international complications. In the eyes of the foreign power, he would still be an American citizen for whom the United States would be deemed responsible (at least to some degree) even though it had no control over him, and on whom the United States could still impose demands even though he had fled this country. At the same time, the foreign country would have a substantial measure of interest in the fugitive now that he was resident on its soil, and might feel called upon to grant him various rights of protection.

In appealing to appellee and those like him to return to face their military obligations, or forfeit their nationality, Congress was seeking to avoid the international problems which could arise if this country attempted to effect the return of draft-evaders by requests to the foreign sovereign which that nation might be unwilling to grant. In times of war or national emergency, when the need for manpower for the armed forces is great, the United States could well feel called upon to make representations to, or bring pressure upon, certain nations to make sure that they do not become refuges or centers for American draft-evaders.[17] And to the bare need for military man-

[17] As already pointed out, in H. Rep. No. 1229, 78th Cong., 2d Sess., pp. 1-2, which accompanied the bill that became Section 401(j), the conditions existing in 1944 were pointed out as follows:

"It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war."

power there would be added the impetus of the sense of fairness to those who did answer the call to service.

Extradition treaties do not normally cover draft-evasion, and foreign countries do not feel obligated to expel men charged with such "political-type" offenses. A true embroilment could result, especially if the foreign country had become "host" to large numbers of evaders. And even if the United States contented itself with communications with the evader himself, he might seek the protection or intercession of the country of flight in the effort to avoid serving in our forces. Particularly if the fugitive leaves this country through disaffection or lack of sympathy for the war or defense program—a not unlikely possibility—will there be both opportunity and motivation for entangling the United States with the other nation. And if the other nation is unfriendly or adverse to American interests, it may be quick to seize upon our demands as a pretext for embarrassing this country.[18]

b. The problems are multiplied if the draft-evader is a dual-national. If he is a citizen of the country in which he seeks refuge—as is Mendoza-Martinez[19]—

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[18] On the prior appeal, appellee questioned the application to Section 401 (j) of the foreign affairs power since the section does not refer to foreign countries but is phrased in terms of "departing from or remaining outside the jurisdiction of the United States". The short answer is, of course, that, aside from the theoretical but unrealistic possibility of territory claimed by no nation, it is as yet impossible for any person to be in any portion of the globe outside the jurisdiction of the United States without being within the jurisdiction of some other country. Vessels and aircraft on or over the high seas are within the jurisdiction of the craft's flag.

[19] Appellee is also a national of Mexico (see the Statement, *supra*, p. 7). While the District Court pointed out, in its earlier opinion,

his actions, and our demands, could place the other nation in the difficult position of seeking a course of action which would protect its own nationals, while continuing friendly relations with another country which might be a strong ally. If the other nation were unfriendly, the difficulties that could arise are obvious.

In *Gonzales* v. *Landon*, 350 U.S. 920, the first case in this Court involving Section 401(j), the dual-national claimed, while living in Mexico (his other country), that he was exempt from American military service under an executive agreement between this country and Mexico, thus apparently seeking to play one of his countries off against the other. Extradition of such a dual-national would often be impossible even if the treaty could be read to cover the offense. Mexico, for instance, need not deliver up any Mexican national, according to the express terms of the extradition agreement between our two countries.[20] And if the evader were a dual-national, not of the "host" country, but of a third nation which asserted an objection to his return, there would likewise be international difficulties.

Although the section is not confined to dual-nation-

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that his conduct during his stay in Mexico was no different from that of other law-abiding Americans there on visas or passports (R. 10), this does not change the potential danger to foreign relations posed by the dual-national status of a draft-evader.

[20] See Article IV, Treaty of Extradition between the United States of America and the United States of Mexico, proclaimed April 24, 1899 (31 Stat. 1818 at 1822). Cf. 30 Am. J. Int. Law 480; Garcia-Mora, *International Law and Asylum as a Human Right*, p. 105 (1956); VI Hackworth, *Digest of International Law*, (1943), Sec. 578.

als, it is pertinent to note that thus far all the litigated cases we know in which individuals have finally been held to have been expatriated under Section 401(j) appear to have involved dual-nationals. (That is true of the three prior cases on Section 401(j) in this Court: *Gonzales*, 350 U.S. 920, *Perez*, and the present case; it is not true of the *Cort* case, No. 20). Congress was not compelled to restrict the statute narrowly and precisely to that category (see *Perez*, 356 U.S. at 59-60), but the grounding of the section in the foreign affairs power does gain added firmness from the fact that dual-nationals form so large a part of the statutory class. See *infra*, pp. 62-63.[21]

c. The potentiality of foreign entanglement through fugitive draft-evaders is not fanciful. American history is marked by international difficulties flowing from attempts to compel or prevent military service by young men. In the 19th century, there was a long involvement with other countries over the asserted continued liability of our naturalized citizens to military obligations imposed by their countries of birth. See III Moore, *Digest of International Law*, Secs. 434-440; Tsiang, *The Question of Expatriation in America Prior to 1907* (1942), *passim*; *Perez* v. *Brownell*, 356 U.S. 44, 48. This was not the least of the causes of our first national war, with Great Britain in 1812. Moore, *op. cit.*, Sec. 434. Later, when this country first found it necessary to conscript for military serv-

[21] Congress was apparently aware of the greater incidence of draft-evasion among dual-nationals, when it adopted Section 401(j) in 1944. See 90 Cong. Rec. 3261-3262.

ice, in the Civil War, the government fell into the anomalous position of—

> resisting, on the one hand, their [foreign powers'] claims for the exemption from our military service of persons who appealed to their protection, and, on the other, the enforcing of claims for the exemption of the like class from military service in foreign countries, on the ground of their having acquired the rights of citizenship in the United States. [Letter of Sec. of State Seward to Motley, Apr. 21, 1863, Department of State, MS, "Instructions, Austria," (National Archives) I, 186; cited in Tsiang, *The Question of Expatriation in America Prior to 1907* (1942), at p. 83.]

As in World War II, some Americans went abroad during that era for the purpose of evading the draft laws. Some of the same evaders who had returned to their native land, then called upon the American government for protection from foreign conscription. Seward to Judd, March 7, 1863, Dept. of State, *Foreign Relations*, 1863, pt. 2, p. 940.[22] There was not, during that period, any law forbidding flight in order to avoid service, but it appears that the reaction to these fugitives' calling upon the United States for protection against service abroad was one of the factors leading to the 1865 statute (discussed *supra*, pp.

[22] "Instances have occurred where Europeans, who have become naturalized citizens of the United States, have left the country when their services were required, and returned to Europe to avoid needful military duty here, and then have invoked the protection of the United States to screen them from military duty there."

34-35) providing for the forfeiture of the citizenship of anyone going beyond "the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered." Cf. Tsiang, *op. cit.*, pp. 83-84; Comment, *Constitutional Law—Citizenship—Power of Congress to Effect Involuntary Expatriation*, 56 Mich. L. R. 1142, 1152.

Appellee contended, on the earlier appeal, that the United States could easily avoid all such international difficulties by making no demands upon the foreign-based draft-evader or his country of refuge. But neither history nor this Court has limited the international complexities within the reach of Congress's foreign affairs powers solely to those arising from demands made upon us by foreign powers. The United States is not restricted to the passive role where its citizens are concerned; in appropriate circumstances it rightly makes suggestions, representations, even demands. The actions taken in Secretary Seward's day, cited immediately above, are examples; others are extradition requests and the protection afforded American persons and property against mistreatment in foreign lands. Similarly, in a time of emergency, when large numbers of draft-evaders are congregating in other countries (see *supra*, pp. 36, 38, for the situation in 1944), both the need for additional servicemen and the sense of fairness toward the men who do serve could properly impel the United States to take steps to obtain the return of the fugitives. The foreign affairs power covers all such dealings with foreign countries, whether the initial communication comes from the United States or from the other nation.

d. By expatriating those who depart from this coun-

try with draft-evasion as their purpose. Congress has eliminated at the outset any further claim that this country would have to the services of these individuals, and has removed all basis for further demands upon them or need to protect them—consequently reducing the danger of potential conflict with the nation to which they have gone. As Mr. Justice Brennan noted with respect to the voting provision of Section 401(e) (*Trop*, 356 U.S. at 106):

> * * * Congress has ordained the loss of citizenship simultaneously with the act of voting because Congress might reasonably believe that in these circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations. * * *

By the same token, Section 401(j) acts to avoid the possible areas of international dispute and conflict to which we have referred, and thus implements the regulation of foreign affairs; as such, it is a reasonable Congressional exercise of the foreign affairs power. "The termination of citizenship terminates the [international] problem." "The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose." *Perez*, 356 U.S. at 60.

3. *The War Power*

Section 401(j) is also sustained by its close and direct connection with the war power and with national de-

fense.[23] The power of the Congress to compel military service by a draft law is beyond dispute. *Lichter v. United States*, 334 U.S. 742; *Selective Draft Law Cases*, 245 U.S. 366.[24] That Congress may impose criminal penalties upon those who elect to avoid the compulsory service is also settled. *Falbo v. United States*, 320 U.S. 549. And where a person obligated to respond to the requirement of compulsory service frustrates the efforts to bring him to the service, and simultaneously prevents adjudication of his criminal liability for breaking the compulsory military service law, the Congress could reasonably conclude that there should be another means of enforcing its plan to provide equitably for the armed defense of the nation at the time when military manpower is most needed.

Unlike desertion, which carries the primary sanction of court-martial and imprisonment, no similar primary check exists to deter those individuals who flee this country to avoid fulfilling their military obligations. Draft-evaders outside the country cannot be apprehended there and imprisoned for their departure or their failure to return. As indicated above (*supra*,

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[23] It does not detract from the validity of an expatriation statute that it finds support in both military and foreign affairs considerations. As was said in *Mackenzie v. Hare*, 239 U.S. 299, 311, concerning the statute there at issue:

> * * * It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. * * *

[24] That the federal government has the power to order our citizens abroad to return, for any lawful purpose, cannot be doubted since the decision of this Court in *Blackmer v. United States*, 284 U.S. 421. Indeed, the Court has also stated, by way of dictum, that it is the duty of every citizen to return to the United States upon the outbreak of hostilities. *The William Bagaley*, 5 Wall. 377 at 408.

pp. 39, 40), they are not normally subject to extradition.[25] Only if they return to this country after they have accomplished their purpose of avoiding service in time of danger is it possible to enforce criminal sanctions against their offense. This delayed punishment would not aid in raising an army when it is most necessary—during active hostilities. As the legislative history shows (*supra*, pp. 34-37), Congress felt that, for the difficult task of raising a wartime army, it needed the immediate deterrent of loss of nationality for evasion by flight abroad.[26] By its very nature, such evasion is always a serious offense, never a technical one (as desertion may be); a severe deterrent is appropriate.

At the same time, Congress could properly weigh the effect of its permitting draft-evaders to remain in a foreign sanctuary upon those who did answer the call and stood ready to give their lives, if need be, to defend the country. Inequality of sacrifice can be a potent destroyer of morale, sapping public confidence and individual integrity. Congress could well conclude that to permit a holder of the privileges of citizenship to absent himself during a time of danger, only to return in better days to accept modest criminal penalties and then resume his place in the community—like appellee who remained abroad until the fighting was

[25] In any event, when the existence of the country may be at stake, it would be intolerable for the government to be forced to rely primarily on the discretion of the foreign country as to whether it will or will not return the draft-evader.

[26] Even after flight abroad, Section 401(j) would act as a goad to quick return, since it has been liberally interpreted to the advantage of those who return (after initial flight) while the war or emergency still continues. See *infra*, pp. 59-61.

safely over, returned to plead guilty and serve a year in jail, and then attempted to pick up the thread of his life in this country would be to sanction conscienceless exploitation of the privileges of citizenship.

In sum, Congress could properly consider that denationalization in this type of case was a direct and necessary exercise of the war power; its judgment had warrant in the realities and was not at all unreasonable. Cf. *Hirabayashi* v. *United States*, 320 U.S. 81, 93; *Korematsu* v. *United States*, 323 U.S. 214; *Lichter* v. *United States*, 334 U.S. 742.

4. *The Inherent Rights of Sovereignty*

The inescapable relationship between allegiance to the United States and citizenship was recognized in *Luria* v. *United States*, 231 U.S. 9, 22, in which the Court said:

> Citizenship is a membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. * * *

The ultimate test of allegiance is submission to the lawful authority of the nation—not necessarily, of course, obedience to all the laws but, at the least, recognition of the power of the state to vindicate its authority through criminal or other compulsory process. When the power of the national legislature to raise armies by means of a draft law was challenged in this Court, in the *Selective Draft Law Cases*, 245 U.S. 366, the Court, affirming the criminal convictions of

those who refused to submit to the draft, stated (245 U.S. at 377-378):

> * * *. Further it is said, the right to provide [for the common defense] is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, *for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power.* * * * [Emphasis added.]

The significant point in the case of the fugitive draft-evader is that not only does he reject the highest duty of citizenship—a call to service [27]—but he also refuses to submit to this country's jurisdiction over him. By deliberately keeping himself beyond the reach of United States criminal sanctions designed to compel him to fulfill his prime duty of service, he repudiates his wider obligation as a citizen to submit to this country's jurisdiction and authority. He rejects all authority of the United States, not merely

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[27] Readiness to serve in the country's armed forces in time of war or emergency has always been a cardinal element of United States citizenship, subject only to the most narrow exception of conscientious objection. The country's demand upon the citizen-soldier has been deemed the highest call to duty. This Court has characterized it as the "supreme and noble" duty (*Selective Draft Law Cases*, 245 U.S. 366, 390), and has recognized the primacy of military service, *when the citizen is called upon by Congress to perform it*, as *the* obligation of citizenship. Cf. *United States* v. *Schwimmer*, 279 U.S. 644; *United States* v. *Macintosh*, 283 U.S. 605; *United States* v. *Bland*, 283 U.S. 636; *In re Summers*, 325 U.S. 561, 572; *Girouard* v. *United States*, 328 U.S. 61, 64; *Falbo* v. *United States*, 320 U.S. 549; *Lichter* v. *United States*, 334 U.S. 742, 756-757.

his duty to serve. He may even pit the weight of the country to which he has fled—or of his other nationality, if he has dual-citizenship—against the power and right of the United States. Unless our government can cut its ties with the fleeing evader, as Section 401(j) requires, it will in reality be denied all power over him, just as *he* denies the government all power over his person. A government which cannot exert force to compel a citizen to perform his *lawful* duty is, to that extent, not sovereign as to him.

Effective jurisdiction can properly be considered by Congress as a necessary concomitant of citizenship. The Fourteenth Amendment itself makes it a prerequisite to citizenship that the person be "subject to the jurisdiction" of the United States.[28] Regardless of the crimes with which an individual may be charged, so long as he remains within the reach of our law enforcement agencies, within the enforcible reach of the process of our courts, his act does not strike at the very foundation of his relationship with his government, and with his fellow-citizens, in so drastic a manner as does the conduct of one who removes himself physically from the jurisdiction of the country in order to elude the grasp of our law. "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U.S. 323, 325.

If citizenship is a relationship comparable to a mutual compact (*Inglis* v. *Sailor's Snug Harbour*, 3

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[28] "All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside." (Emphasis added.)

Pet. 99, 124; *Luria* v. *United States*, *supra*), the fundamental articles of that agreement are the submission of the citizen to the jurisdiction of lawfully constituted government, and the agreement of the government to proceed within the confines of the powers delegated to it. The withdrawal of the individual from the most basic of the elements of that agreement—acceptance of United States jurisdiction and of the citizen's obligation to support the nation in time of emergency—terminates the reciprocal contract. At that point, complete dissolution of all of his ties to the nation cannot be deemed arbitrary.

We submit, in short, that there is a limit to the refusal to perform the obligations of citizenship, beyond which further refusal may justify the divestiture of that citizenship by Congress. That limit has been reached by appellee in the conjunction of the two elements here present: draft evasion plus deliberate absence from the jurisdiction of the United States in furtherance of that purpose. As was said in a different context in *Kawakita* v. *United States*, 343 U.S. 717 at 735-736:

> If he can retain that freedom and still remain an American citizen, there is not even a minimum of allegiance which he owes to the United States while he resides in the enemy country. That conclusion is hostile to the concept of citizenship as we know it, and it must be rejected. One who wants that freedom can get it by renouncing his American citizenship. He cannot turn it into a fair-weather citizenship, retaining it for possible contingent benefits but meanwhile playing the part

of the traitor. An American citizen owes allegiance to the United States wherever he may reside.

C. *Section 401(j) does not violate the Due Process Clause of the Eighth Amendment*

1. *There Is No Violation of Due Process*

a. It has been suggested that the statute offends due process because it is applied administratively, without a hearing or judicial proceeding, and that citizenship cannot be divested in that fashion. But the fact is that the statute attaches the consequence of expatriation to certain acts, and does not itself prescribe any procedure for determining whether or not those acts have occurred. True, the initial determination whether Section 401(j) has been brought into operation by a particular individual will often be made by the executive branch, when it seeks to deport him as an alien illegally in the country, or to exclude him from entering the country (if he is outside), or to deny him a passport or some other right available to citizens.[29] This happens because the officials, like the courts, are required to enforce the statute and must apply it to the particular cases coming before them.

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[29] Appendix B to the Government's Brief in the *Perez* case (No. 572, Oct. Term, 1956, No. 44, Oct. Term, 1957) at pp. 62-63, points out that the Commissioner of Immigration and Naturalization reported that a total of 883 persons had been administratively deemed expatriated under Section 401(j) (or the comparable provision of the 1952 Act) for the eight-year period from July 1, 1948, to June 30, 1956. The Immigration and Naturalization Service reports that 122 persons were deemed expatriated between July 1, 1956, and June 30, 1960, because they departed from or remained away from the United States to avoid service in the armed forces.

The administrative ruling, however, is not the end of the story or even the main chapter. Under the Nationality Act of 1940, the individual was entitled to bring a declaratory judgment action to establish his citizenship. See Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171; *Perez* v. *Brownell*, 356 U.S. 44, 47, fn. 2; *Trop* v. *Dulles*, 356 U.S. 86, 123, fn. 3 (dissenting opinion). The trial was *de novo*, and once the plaintiff established the fact of his having been a citizen, the burden was on the United States to prove that he had lost that citizenship by "clear, unequivocal, and convincing" evidence which does not leave that issue in doubt. *Gonzales* v. *Landon*, 350 U.S. 920; *Nishikawa* v. *Dulles*, 356 U.S. 129. This standard of proof is comparable to that applied in a criminal case, and the plaintiff's rights were fully protected. If the United States were required to bring suit to divest appellee of his citizenship while he remained abroad, the spectacle of a trial *in absentia* would develop. As we have suggested (*supra*, pp. 44-51), it is the very fact that appellee put himself beyond the reach of our normal legal process that is the basis for this statute.[30]

b. Nor can appellee claim that he lacked notice that

[30] We discuss the administrative and judicial remedies available under Section 349(a)(10) of the Immigration and Nationality Act of 1952 in our brief in *Rusk* v. *Cort*, No. 20, this Term. The Immigration and Nationality Act of 1952 meets the requirements of due process in Section 360(b) and (c), providing for further administrative determination of the citizenship status of one found to have expatriated himself, and for ultimate judicial action by writ of habeas corpus. If a trial *de novo* is constitutionally required—an issue not presented in the *Cort* case—it may be had in the habeas corpus proceeding.

his act contravened the laws of this country, and that the ultimate sanction should not be applied for that reason. He has conceded knowledge of his obligations under the selective service laws, and that he deliberately flouted those laws, eventually leaving the jurisdiction of the United States, and remaining abroad until after the war for that very purpose alone. See *supra*, pp. 7, 8. Due process requires that a man be given notice of his obligations which is reasonable and available under the circumstances. *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-315; *Blackmer* v. *United States*, 284 U.S. 421, 439, 443. Here, appellee, with deliberateness, put himself out of contact with the authorities, giving no notice that he was leaving and leaving no forwarding address. On the part of the government, the laws concerning selective service and expatriation were duly promulgated in the usual fashion. It may be assumed that appellee did not know the expatriative effect of his remaining abroad, and did not wish to expatriate himself. But he did know that to avoid military service was a violation of our laws, and he went and remained abroad "for the sole purpose of evading and avoiding" military service (R. 3). It is now settled that voluntary performance of an expatriating act is not excused by lack of knowledge that expatriation will result. *Mackenzie* v. *Hare*, 239 U.S. 299; *Savorgnan* v. *United States*, 338 U.S. 491; *Perez* v. *Brownell*, 356 U.S. 44, 61-62 (all discussed *supra*, pp. 29-33).

2. *The Statute Does Not Impose Punishment, Nor Does It Violate the Eighth Amendment*

a. Punishment

(*1*). In *Trop*, five of the Justices held that Section 401(g), the desertion provision there involved, imposed punishment, and must be treated as such. We

submit that Section 401(j), in contrast, should not be so viewed, even under the criteria stated by the prevailing opinions in *Trop*.[31] The statute there found constitutionally defective operated only after the deserter had been caught and punished, and he could be punished by death or life imprisonment. Loss of nationality occurred only after the judgment of a court-martial had been entered, and only if subsequently the military authorities declined to reinstate the deserter. The desertion for which denationalization would result need have no element of removal from the jurisdiction of the United States; indeed, expatriation could result, under the statute, when the deserter had never been outside the United States. The offense could be quite technical (see Mr. Justice Brennan in *Trop*, 356 U.S. at 113), and need not have been serious. Moreover, expatriation of the deserter, after the event, could not avoid the harm of desertion except by acting as a deterrent (see 356 U.S. at 109-110), and that deterrent effect would probably be tenuous, in the Court's view, in the case of a capital offense like desertion. Likewise, there would be little or no effect on foreign affairs.

On the other hand, Section 401(j) looks to the future, to a far greater extent, and has important non-penal objectives of its own. Among the purposes of the statute are (a) the prevention of future embroilments with foreign nations (*supra*, pp. 37-44), and (b) the effort to persuade the evading fugitive to return to perform

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[31] In *Flemming* v. *Nestor*, 363 U.S. 603, 615, the Court pointed out that, although the majority in the *Trop* case characterized the statute as punitive, "no single opinion commanded the support of a majority. The plurality opinion rested its determination, at least in part, on its inability to discern any alternative purpose which the statute could be thought to serve. *Id.*, at 97. The concurring opinion found in the specific historical evolution of the provision in question compelling evidence of punitive intent. *Id.*, at 107-109."

his service or to submit to justice (*supra*, pp. 44-47). The criminal act, draft evasion, is not what invokes, in itself, the denationalization; instead, it is an act having no inherent criminal taint (*i.e.*, leaving or remaining outside the country) but which is always serious (and never merely a technical infraction) when coupled with draft evasion. The power of the sovereign is being used to persuade or induce the citizen to return to American jurisdiction for legitimate and important purposes. This is a regulatory, not a punitive, aim. Similarly, it is not punitive to sever the allegiance of those, like appellee, who have rejected all authority of the United States over them, by placing themselves wholly beyond its jurisdiction and power (*supra*, pp. 47-51). Such severance of allegiance recognizes a basic repudiation of citizenship which has already taken place.[32]

(2). In addition, the legislative history of Section 401(j) shows that punishment of draft-evaders was not the exclusive, nor the dominant, concern of the Congress which enacted it in 1944. The letter of Attorney General Biddle (see *supra*, pp. 35-36) treated the contemplated provision for what it was—a designation of loss-of-nationality rather than a penal measure. He carefully distinguished between "prosecution" for violation of the selective service laws and

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[32] On the face of the Nationality Act of 1940 and of the Immigration and Nationality Act of 1952, the Congress made a distinction between penal provisions and its designation of certain acts as involving loss of nationality. In the Act of 1940 the chapter entitled "LOSS OF NATIONALITY" followed, and was separated by only a single paragraph from, a whole section entitled "PENAL PROVISIONS" (54 Stat. 1163). In the Act of 1952, the chapter entitled "GENERAL PENALTY PROVISIONS" is Chapter 8 of Title II of the Act (66 Stat. 226), whereas the chapter entitled "LOSS OF NATIONALITY" is Chapter 3 of Title III (66 Stat. 267). See *Helvering* v. *Mitchell*, 303 U.S. 391, 404, with respect to the significance of the physical separation of non-penal provisions of a statute from the penal sanctions.

expatriation; "in addition" to criminal punishment, he said, it would be proper for fugitive evaders to lose their United States citizenship; he referred to them as not "worthy" of citizenship, just as doctors or lawyers who shirk their responsibilities may be determined not to be fit to retain their status and license. The stress, moreover, was on the draft-evaders' flight from the country, rather than on the draft-evasion by itself. It was the character of the expatriating act as a whole, in relation to the status of citizenship, that was the concern of the legislation, rather than punishment directed against those who commit or perform the act.

There were, it is true, individual references in debate to "penalties,"[33] but in appraising the action of Congress for constitutional purposes the looseness of common parlance cannot be allowed to outweigh the essential purpose and true nature of what was done. Colloquial language is not enough to convict Congress of deliberately contravening constitutional safeguards, at least where constitutional grounds for legislating exist. This Court has observed "that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground," *i.e.*, that a punitive purpose in fact lay behind the statute. *Flemming* v. *Nestor*, 363 U.S. 603, 617; *Communist Party* v. *Subversive Activites Control Board*, No. 12, O.T. 1960, slip op., p. 79, see also *Watkins* v. *United States*, 354 U.S. 178, 200; *Barenblatt* v. *United States*, 360 U.S. 109, 132; *Wilkinson* v. *United States*, 365 U.S. 399, 412.

(3). Thus, the structure and purposes of the statute, as well as the Congressional debates, show that punishment is not being imposed. And, as the Court has re-

[33] The terms "penalty", "penalties", "penalized" appear only in the Senate discussion. The House discussion was not phrased in any such terms.

cently reiterated, punishment is not involved merely because a consequence ensues which is financially, emotionally, or otherwise objectionable or harmful to the person affected, and which may incidentally add to the deterrent effect of the prison terms or fines which may be imposed as true criminal penalties for the conduct. See *Communist Party* v. *Subversive Activities Control Board*, No. 12, O.T. 1960, decided June 5, 1961, slip op., pp. 78-85; *Flemming* v. *Nestor*, 363 U.S. 603, 612-621; *De Veau* v. *Braisted*, 363 U.S. 144, 157-160 (plurality opinion); *Trop* v. *Dulles*, 356 U.S. at 124-125 (dissenting opinion).[34] The law knows many such disabilities or non-penal sanctions. See *e.g.*, *Helvering* v. *Mitchell*, 303 U.S. 391, 399-401; *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 554-555; *Rex Trailer Co.* v. *United States*, 350 U.S. 148.[35] See also, *e.g.*, 18 U.S.C. 202, 205, 206, 207, 216, 218, 281, 282, 290, 593, 1905, 1907, 1908, 1912, 1913, 2381, 2383, 2385, 2387. "The penal and remedial provisions are, therefore, distinct and cannot be confounded" (*O'Sullivan* v. *Felix*, 233 U.S. 318, 324).

Civil regulations based on past conduct, even though the regulation is detrimental to the individual, are not invalid, or transformed into punitive sanctions, where they represent a *bona fide* exercise of regulatory power to accomplish a non-penal purpose, and are not de-

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[34] With respect to expatriation, Congress has always been aware that some of its enactments in this area may lead to severe or harsh results, and has therefore provided for various types of mitigation and amelioration. See the Supplemental Brief for the Respondents on Reargument in *Perez*, *Nishikawa*, and *Trop* (Nos. 44, 19, and 70, Oct. Term 1957), at pp. 7-11.

[35] These three cases involve, or refer to, the following non-penal sanctions: (a) disbarment; (b) deportation of aliens; (c) denial or revocation of a license to practice a profession, trade, etc.; (d) forfeiture of goods; (e) additional tax, customs, etc., penalties and "additions" to taxes or duties; and (f) statutory suits for liquidated damages for fraud.

signed to inflict punishment. Disbarment is a prime example. Cf. *Sacher* v. *Association of the Bar*, 347 U.S. 388. Another instance is furnished by *Hawker* v. *New York*, 170 U.S. 189, which upheld a state law preventing a doctor from practicing medicine, because of a criminal conviction occurring years before the statute was passed. See, also, *Barsky* v. *Board of Regents*, 347 U.S. 442. *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, made the same general ruling as to the refusal of public employment for prior subversive activity. Cf. *Adler* v. *Board of Education*, 342 U.S. 485; *United Public Workers* v. *Mitchell*, 330 U.S. 75; *American Communications Assn.* v. *Douds*, 339 U.S. 382; and the cases cited *supra*, p. 57. In short, there are many instances in which non-penal disabilities, disqualifications, or sanctions follow upon conduct which may also, in whole or in part, be criminal.[36]

This Court's decisions with respect to aliens involve, of course, considerations not applicable to citizens, but the holdings that deportation is not punishment (e.g., *Mahler* v. *Eby*, 264 U.S. 32, 39; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594-595; *Galvan* v. *Press*, 347 U.S. 522, 531; *Marcello* v. *Bonds*, 349 U.S. 302, 314) well illustrate the principle that severe consequences of, or disabilities imposed on, specified conduct do not *per se* constitute punishment. In the case of aliens, the sanction of deportation is imposed because Congress is "seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of security" (*Mahler* v. *Eby*, *supra*, 264 U.S. at 39).

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[36] See, generally, Note, *Punishment: Its Meaning In Relation To Separation of Power and Substantive Constitutional Restrictions and Its Use In The Lovett, Trop, Perez, and Speiser Cases*, 34 Ind. L.J. 231, 239-241, 249-251, 261-263, 270-271, 272-296

Similarly, denaturalization is not punishment. See *Klapprott* v. *United States*, 335 U.S. 601, 612; *Chaunt* v. *United States*, 364 U.S. 350, 353; *Politeo* v. *United States*, 364 U.S. 426.

In the present case, the disability of loss-of-nationality is imposed because Congress has determined that persons like appellee can no longer accurately be called American citizens. In these classes of cases deportation, denaturalization, and denationalization the determination may result in serious hardship. But the deportation and denaturalization cases show that severity of the resulting consequences is not indicative of punishment where those consequences have a relationship to a purpose independent of punishment, as is the case here in the aim to delineate those who shall no longer be treated as citizens of the United States. See, also, for other examples, *Fleming* v. *Nestor*, 363 U.S. 603, 612-621; *Communist Party* v. *Subversive Activities Control Board*, No. 12, O.T. 1960, decided June 5, 1961, slip op., pp. 78-85; *Rex Trailer Company* v. *United States*, 350 U.S. 148, 150-151 (in which fixed amounts of $2,000 on every count of a fraud recovery proceeding by the Government were held to be liquidated damages and not fines); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 549; and the other cases cited *supra*, at pp. 57-58.

(4). A further indication that this statute is not punitive is the fact that the mental state required is different in kind from that usually found in a criminal statute. Section 401(j) makes expatriation depend on leaving or remaining outside of the United States "for the purpose" of evading or avoiding military service. This goes beyond a mere intent, commonly inferred from one's acts, that one intended to do what one did. The Immigration and Naturalization Service and the Board of Immigration Appeals have

required a showing that the dominant or primary motive in leaving or remaining away has been to avoid military service. When the evidence might fairly give rise to an inference that the primary motive was not to evade the draft, but, *e.g.*, to support one's family, or conduct one's business abroad, it has been found that citizenship was not forfeited, regardless of possible criminal penalties for draft evasion. See Matter of J—, Int. Dec. #979; Matter of G— M—, 2 I. & N. Dec. 861; Matter of M—, 2 I. & N. Dec. 910; Matter of G—, file # A-6544269 (B.I.A. 1947) (unreported decision; mere violation of selective service regulations was not sufficient to sustain finding of expatriation). The government's burden of proof has been recognized to be heavy. The case of J—, Int. Dec. # 979, *supra*, is illustrative. He left the United States for Mexico in early 1951 and failed to report for induction in May 1951, as ordered. After negotiating for draft deferments and related relief for six years, he agreed to return to the United States in 1957, provided an indictment for draft evasion would be suspended, pending an application to his draft board to be accepted for service. This was done, but the board rejected his application, apparently because he had since turned 26 (the reasons were not of record). The indictment was then pressed to a conviction, and J—, after serving his sentence and returning to Mexico, once again sought admission to the United States. After several intermediate decisions, the Attorney General ordered his admission as a United States citizen, apparently on the ground that J—'s testimony that he was in Mexico for the six years on legitimate business, and that he never wanted more than a short deferment, had not been successfully countered by the government's evidence, or by any logical inferences from his conduct.

Where the expatriative act relied on was remaining away after leaving the United States prior to the national emergency, there has been required a showing that the individual intended to come to the United States, and then refrained from doing so solely or primarily because he feared the military service obligation. Matter of M—, *supra*; Matter of A—S—, file = A-6450178 (B.I.A. 1955) (unreported decision; held, government failed to show a "desire" to come to the United States overcome by a reluctance to serve); Matter of S—, file = A-6661514 (B.I.A. 1947) (unreported decision); Matter of N—C—, file = A-10460191 (B.I.A. 1957) (unreported decision).

In the matter of G— R—, = A-6732816, 3 I.&N Dec. 141, in which a native-born citizen had been taken to Mexico and remained there for several years, entering and departing the United States once in 1945, and reentering subsequently as a United States citizen, it was held by the Board of Immigration Appeals that the government had not proved his intention to evade the draft. No determination was made as to his criminal liability, and the Immigration and Naturalization Service, in its Central Office Memorandum, took the position that criminal liability was not controlling on a determination of expatriation.

Conversely, the return of the individual to this country during the war or emergency makes it very difficult to show that he departed or remained abroad for the dominant or primary motive of evading the draft. See Matter of J—, *supra*. If appellee had returned before the end of the fighting, perhaps he, too, could have saved his American nationality.[37]

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[37] The unreported decisions of the Board of Immigration Appeals reveal a large number of cases in which, despite proof that a draft-evader had left or remained outside the country, it was held that he had not lost his citizenship, for reasons such as those mentioned

b. Cruel and Unusual or Invalid Punishment

We have urged above (*supra*, pp. 53-61) that the expatriation provided by Section 401 (j) should not be viewed as "punishment". But even if it is, we submit that it does not impose an invalid "punishment" or one contrary to the Eighth Amendment—at least as applied here.

(*1*). The general reasons why expatriation is not an improper "penalty" for those who flee the country to evade the draft have been outlined above (*supra*, pp. 53-59) at the outset of our argument why it is not a penalty at all. In particular, it is important, first, that, unlike desertion (as viewed by Mr. Justice Brennan in *Trop*, 356 U.S. at 112-113), flight to evade the draft must *always* be a very serious act, and, second, that Congress could validly consider that there are no practical or useful alternatives to denationalization.

(*2*). In appellee's case, it cannot be said that the result of the statute is to impose statelessness. Appellee is a Mexican national (*supra*, p. 7), and he retains that citizenship. He would not become stateless. We estimate that the majority of the cases in which Section 401 (j) has been applied have also involved dual-nationals of Mexico and the United States. The section was enacted in 1944 primarily because of the large numbers of men who had gone to Mexico (many or most of them, apparently, dual-nationals) to "sit

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in the text, *supra*.

These administrative interpretations have also been assumed or adopted by the courts when they have had occasion to pass on issues under Section 401(j). See, *e.g.*, *Gonzales* v. *Landon*, 350 U.S. 920; *Ponce* v. *McGrath*, 91 F. Supp. 23 (S.D. Cal.).

See, generally, Roche, *Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. of Pa. L.R. 25, 64; Sharon, *Loss of Citizenship by Draft Dodgers*, 5 I. & N.S. Monthly Rev. 97, 98 (Feb. 1948).

out" the war. See the legislative history, *supra*, p. 34-37. *Rusk* v. *Cort* (No. 20, this Term) is the only court decision of which we know in which a person who was a national of the United States alone has been held to fall within Section 401 (j), or the comparable provision of the Immigration and Nationality Act of 1952;[38] and, though statistics are not available, we believe that very few persons have been deemed administratively expatriated under the section who are not dual-nationals. The majority of the administrative cases appear to have involved men who were nationals of both the United States and Mexico.

(3). If it be thought that "punishment" cannot be imposed except after a criminal trial and conviction, that requirement is fulfilled here. Appellee has been tried and convicted of draft evasion, and he concedes that he fled and remained abroad in order to evade the draft. *Supra*, pp. 6-9. Even if it is punishment, there is no requirement that the consequence of expatriation be set out in the draft evasion statute, or that it be pronounced at the time of the criminal conviction or sentence. See *Gore* v. *United States*, 357 U.S. 386, 392-393; *Trop*, 356 U.S. at 122-123 (dissenting opinion); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 555-556 (concurring opinion).

CONCLUSION

For these reasons, we think that Section 401 (j) is sustained by considerations comparable to those which moved the Court in *Perez* v. *Brownell*, and that it does not fall under the strictures of the Justices whose views controlled *Trop* v. *Dulles*. The crucial factors here are: (a) the significant impact of draft evasion, by flight abroad, on this country's foreign affairs; (b) the ser-

[38] We discuss in our *Cort* brief the particular problem stemming from that fact.

ious and inequitable effect on the raising of an army; in time of war or emergency, of evasion of this type (which is never merely technical); (c) the complete repudiation by the fugitive draft-evader of this country's sovereignty over him; and (d) the absence of appropriate or effective alternatives to expatriation in these circumstances. It is these factors, in the main, which distinguish Section 401 (j) from the desertion statute Section 401 (g)) involved in *Trop* and evoke the authority of the *Perez* ruling and opinion.

It is therefore respectfully submitted that the judgment of the court below should be reversed and judgment ordered to be entered for the appellant.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
OSCAR H. DAVIS,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
PATRICIA R. HARRIS,
JEROME M. FEIT,
Attorneys.

AUGUST, 1961.

APPENDIX

The 1865 Act as an Expatriation Statute

The great weight of history, authority, and the other relevant aids to interpretation is to the effect that Section 21 of the Act of March 3, 1865, 13 Stat. 490, *supra*, pp. 34-35, was a loss-of-citizenship and loss-of-nationality statute, even though it referred only to the loss of "rights of citizenship."

1. The Act itself specifically decrees that *alien* deserters and draft-evaders shall forfeit "their rights to become citizens", thus indicating that citizenship itself (and not merely such rights as the franchise) was involved. Again, Congress took pains to prescribe that draft-evaders and deserters "shall be deemed to have voluntarily relinquished and forfeited" their rights. These are words appropriate to loss of nationality and loss of citizenship as such, rather than merely to the political rights appurtenant to citizenship; in the latter case, terms of voluntary relinquishment or forfeiture are not normally used but only an outright prohibition or prescription. Moreover, the Revised Statutes included the Act under the title of "Citizenship" (Title XXV) (Rev. Stats. 1996, 1998) along with the 1868 expatriation statute (Rev. Stat. 1999), and other provisions dealing with nationality.[1]

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[1] These provisions show that Congress has often used the terms "rights of citizenship" and "citizenship" interchangeably. For instance, Rev. Stat. 1993, providing for citizenship of children born abroad of fathers who were Americans at the time of the child's birth goes on to say: "but the *rights of citizenship* shall not descend to children whose fathers never resided in the United States" (emphasis added). See *Weedin* v. *Chin Bow*, 274 U.S. 657. And the Expatriation Act of 1868 itself says that "this Government has freely received emigrants from all nations, and invested them with the *rights of citizenship* * * *" (emphasis added). See also *Shelley* v. *United States*, 120 F. 2d 734, 735 (C.A.D.C.) (Act of July 2, 1940, 54 Stat. 715).

2. Administratively, the 1865 Act was likewise recognized as a loss-of-nationality statute. Early evidence of this historical fact is furnished by Secretary of State Hamilton Fish's answer, in 1873, to queries on the subject of expatriation directed by President Grant to all his Cabinet officers. In discussing the general question, Secretary Fish wrote (*Foreign Relations*, 1873, Part 2, p. 1187):[2]

> * * * and it will be remembered that Congress has asserted its right to *denationalize its own citizens*, and has defined one mode whereby the right of citizenship shall be forfeited, in the act of March 3, 1865, (13 Stat., p. 490,) which provides that, in addition to the other lawful penalties of desertion from the military or naval service of the United States, all persons who shall desert such service, or who, being enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States with intent to avoid any draft into the military or naval service, duly ordered, *shall be deemed to have voluntarily relinquished and forfeited their rights of citizenship, or to become citizens*, and shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof." [Emphasis added.]

The Citizenship Board of 1906 (see *Perez*, 356 U.S. at 49-50) considered it a statutory provision for loss of citizenship. See H. Doc. No. 326, 59th Cong., 2d Sess., p. 159. The State Department so construed it. See the remarks of Assistant Legal Adviser Flournoy at the

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[2] This was less than a decade after the passage of the 1865 Act.

hearings on the proposed Nationality Act of 1940 (Hearings before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., on H.R. 6127, at pp. 38, 132-133; cf. 186-187) and III Hackworth, *Digest of International Law* (1942), pp. 276-279. The Cabinet Committee which proposed the 1940 Nationality Act (see *Perez*, 356 U.S. at 52-56) drew upon the 1865 statute as the parent of its suggestion as to expatriation for desertion (Hearings, *supra*, pp. 491-492). And when Attorney General Biddle proposed, in 1944, that Section 401 (j) be added to the 1940 Act, he mentioned that the comparable 1865 Act existed and was operative during World War I. See H. Rep. No. 1229, 78th Cong., 2d Sess. (quoted, in part, *supra*, pp. 35-36, 38). See also the letter of Secretary of War Stimson, dated March 6, 1943, recommending the provision which became Section 401 (g) of the 1940 Act, and referring to the prior law (the 1856 Act, as amended), as dealing with loss of "citizenship" which can be restored. S. Rep. No. 382, 78th Cong., 1st Sess., p. 10.

3. Several of the 19th century cases which applied the 1865 Act, in the context of the right to vote, also characterize the statute broadly as relating to citizenship itself. See *Gotchius* v. *Matheson*, 58 Barb. 152, 156, 157, 158, 159, 160 ("absolute forfeiture of citizenship," "forfeiture of citizenship", "deprive this class of persons of citizenship," "plaintiff's citizenship has been forfeited"); *Stevenger* v. *Healey*, 50 N. H. 448, 451 ("deprive any person of citizenship", per Jeremiah Smith, J.); *McCafferty* v. *Guyer*, 59 Pa. 109, 110 ("lost his citizenship under the Act of Congress of March 3d, 1865", per Strong, J.); *Huber* v. *Reily*, 53 Pa. 112, 114, 115, 116, 118 ("forfeiture of citizenship" (several

times), "deprivation of his citizenship of the United States", per Strong, J.).[3]

4. The legislative history of the original 1865 Act does not cast much light, one way or the other, on its precise meaning, but the history of the 1912 amendment (restricting its application to peacetime desertion) is clear that the Congress then recognized the provision as one for full loss of nationality.

(*a*). The pertinent 1865 provision—Section 21 of the Act of March 3, 1865; 13 Stat. 487, 490, ch. 79—actually formed a part of an omnibus military measure, passed in the very closing days of the Second Session, of the Thirty-Eighth Congress, which was entitled "An Act to amend the several Acts heretofore passed to provide for the Enrolling and Calling out the National Forces, and for other Purposes." But the recorded history of that particular measure hardly mentions this provision.[4] It is clear that Section 21 was taken, at the end of the session, from comparable portions of other military bills which had earlier passed the Senate and the House (in differing forms) but had not been enacted into law, and the section was then incorporated, with little discussion, in the omnibus bill together with other unrelated provisions which Congress desired to make law. The true history of the provision, such as it is, is found in the debates on those earlier unsuccessful bills—S. 408 (passed by the Senate only) and H. R. 678 (passed by the House only), of the 38th Congress, 2d Session.[5]

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[3] Mr. Justice Strong, later a member of this Court, took pains in his *Huber* opinion to point out that Congress could not legislate with respect to voting in the states.

[4] The Act of March 3, 1865, was H. Jt. Res. No. 170; see Cong. Globe, 38th Cong., 2d Sess., pp. 907, 915, 927, 1005, 1294-1295, 1332, 1335, 1358, 1361, 1378, 1380, 1386, 1398, 1404, 1412, 1413.

[5] For the history of H. R. 678, as a whole, see Cong. Globe, 38th

The debates on the parts of those bills concerned with the loss of the rights of citizenship for desertion and draft-evasion stress the loss of the right to vote—disenfranchisement—and the inability to hold office as the primary consequences of the measure. See Cong. Globe, 38th Cong., 2d Sess., pp. 642-643, 1155; also p. 1378 (on the later provision in the omnibus bill). Such emphasis is quite understandable since, in 1865, that *was* the major consequence of the loss of citizenship; this country had virtually no laws barring aliens, who were as free to come and go as were citizens, and no laws providing for aliens' deportation; the great difference between citizens and aliens was in the right to vote and to hold office. Nevertheless, Senator Hendricks, in opposing the provision, did characterize it in these general terms which unmistakably refer to citizenship, as such: "I submit to Senators that *it is a horrible thing to deprive a man of his citizenship, of that which is his pride and honor*, from the mere fact that he has been unable to report upon the day specified after being notified that he has been drafted." (Cong. Globe, 38th Cong., 2d Sess., p. 643); (emphasis added).

(*b*). The reports and the debate on the 1912 Act modifying the 1865 statute to apply only to peacetime desertions (Act of August 22, 1912, 37 Stat. 356)[6] are perfectly plain that Congress then viewed the 1865 statute as imposing loss of citizenship in the fullest sense, and

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Cong., 2d Sess., pp. 280, 298, 338, 974-980, 1034-1035; 1074, 1114, 1154-1155, 1160-1161, 1169.

For the history of S. 408, as a whole, see Cong. Globe, 38th Cong., 2d Sess., pp. 489, 572-573, 604-616, 609, 631-643.

[6] H.R. 17483, 62d Cong., 2d Sess.; H. Rep. No. 335; S. Rep. No. 910; 48 Cong. Rec. 2903-2905, 9542, 11131.

that Congress wished to continue that provision only for wartime desertions and draft-evasion.[7]

The House Report (H. Rep. No. 335, 62d Cong., 2d Sess., p. 2) dwells on the severity of the 1865 Act as applied to peacetime desertions, and declares that the effect of the 1865 Act

> has been, and will continue to be, so long as it remains on the statute book, *to make outlaws of thousands of American citizens* who, as boys or young men, from homesickness, dissatisfaction with military life, or without consideration of the fearful penalty imposed, desert from the Army or Navy.
>
> There are in the United States today *thousands of men who are literally men without a country* and their numbers will be constantly added to until the drastic civil-war measure which adds this heavy penalty to an already severe punishment imposed by military law, is repealed.[8] [Emphasis added.]

On the floor of the House, Representative Roberts, the author of the bill, emphasized the harshness of the 1865 Act with respect to peacetime deserters, and repeated that "we have in this country today thousands upon thousands of young men of American birth who are literally men without a country"; he used the phrases "loss of citizenship", "now robbed of citizenship", and "loss of rights of citizenship" interchange-

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[7] The 1912 amendment left the draft-evasion provisions of the 1865 Act in effect, but they were, of course, inoperative from the Civil War to the passage of selective service legislation in World War I.

[8] This House Report also quotes from reports and communications of the Secretary of the Navy clearly revealing that he interpreted the 1865 Act as depriving deserters of citizenship.

The Senate Report (S. Rep. No. 910, 62d Cong., 2d Sess.) is not as explicit as the House Report, but it reveals the same understanding of the 1865 Act.

ably. 48 Cong. Rec. 2903-2904. He also referred to a provision in the bill for mitigation and clemency by the President as a provision that the President "could restore citizenship" in those cases "where it had been forfeited prior to the passage of the act". 48 Cong. Rec. 2904.[9] There is no doubt that the 1912 Congress—and prior Congresses in which similar ameliorative bills had been considered—understood the 1865 statute to provide for denationalization for desertion and draft-evasion.

[9] The Senate debate (48 Cong. Rec. 9542) was perfunctory, dwelling on a minor Senate amendment as to reenlistments.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 2

ROBERT F. KENNEDY, Attorney General of the United States,
Appellant,

vs.

FRANCISCO MENDOZA-MARTINEZ,
Appellee.

On Appeal from the United States District Court for the Southern District of California, Northern Division

BRIEF FOR APPELLEE

DI GIORGIO AND DAVIS,
By THOMAS R. DAVIS,
FISCHER, WILLIS & PANZER,
By JOHN W. WILLIS,
1021 Chester Avenue, Bakersfield, California.
Attorneys for Appellee.

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Appellee.

On Appeal from the United States District Court for the Southern District of California, Northern Division

BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

This case, as the Court knows, is here for the third time. In the main we have made our arguments as well as we were able to make them. In view of the fact that the record in the prior hearing has been incorporated in the present one, it is respectfully hoped

that the Court will refer to our original brief in connection with issues other than those directly involved in the present remand.

It is our first duty, of course, to deal with the impact of the doctrine of collateral estoppel. This is the only non-constitutional issue and was the cause for the remand after it was raised by the Court *sua sponte*. But in considering the case on remand on this latest occasion the trial judge also dealt further with the problem of procedural due process of law. Thus (without reaching the utlimate question of whether denaturalization on this ground was within the power of Congress to impose) the trial judge further considered whether the statute was fatally defective by virtue of its failure to provide the basic safeguards to which a defendant in a criminal proceeding is entitled (R. 43-44.) The second portion of this brief will therefore be devoted to this subject.

Counsel for the Government have accurately and without coloration complied with the requirements of rule 40(1)(a) through (e). No supplementation is necessary.

SUMMARY OF ARGUMENT

In 1944, when Section 401(j) was enacted by Congress, appellee was residing in the Republic of Mexico. Since the statute imposes loss of citizenship *ipso facto*, without the necessity for any hearing, appellee necessarily lost his citizenship as of that date if the statute was applicable to him. And also as of that date appellee necessarily became a non-resident alien.

As such, after that date, he was no longer subject to Selective Service, since the only aliens so subject were those who resided in the United States. Accordingly, when the Government charged appellee with draft evasion and subsequently obtained his conviction therefor, not for the period 1942 to 1944 but for the period 1942 to 1946, it necessarily admitted that appellee had not lost his American citizenship.

The Government cannot escape this logic by urging that appellee's offense was a "continuing" one simply because appellee admittedly continued to be a fugitive as a result of his original offense. The commission of the offense must have stopped when Section 401(j) rendered appellee a non-resident alien. If it did not stop at that point, it is inescapable that the statute had no application to this appellee. Therefore the Government should not now be heard to assert that appellee had lost his citizenship when it caused him to be imprisoned, in part, on the basis of that same citizenship.

This is no mere hypertechnical exercise in logical deduction without contact with the realities of the case. On the contrary, it is a reasonable and proper inference that Judge Yankwich took into consideration the duration of the offense and that the period of four years, rather than two years, mitigated against Mendoza in the fixing of the sentence.

II

Section 401(j) is a penal, punitive measure. The history of this form of punishment and the history

of this particular statute require this conclusion—a conclusion already reached, for practical purposes, in *Trop v. Dulles,* 356 U.S. 86. As a penal statute, it does not even begin to comply with the requirements of due process which are operative in a criminal proceeding. The right to bring an action for declaratory relief under Section 503 of the Nationality Act cannot compensate for this deficiency, since it is no more than a civil action for declaratory relief in equity.

ARGUMENT

I

THE GOVERNMENT IS COLLATERALLY ESTOPPED NOW TO DENY THAT APPELLEE IS A CITIZEN OF THE UNITED STATES BY VIRTUE OF THE TERMS OF HIS PRIOR INDICTMENT AND CONVICTION FOR DRAFT EVASION.

To determine whether appellee's criminal conviction was premised in any manner upon his citizenship status, it is necessary that the indictment and judgment of conviction be studied. These were attached to the second amended complaint (amended pursuant to the terms of the remand) and now appear at R. 24 et seq. of the new record.

According to the indictment and the judgment, appellee departed the United States and went to Mexico for the purpose of draft evasion on or about November 15, 1942, and remained there until on or about November 1, 1946.

The classes of persons liable for military duty under Selective Service were defined at 50 U.S.C.A. 303(a), which read in part as follows:

> "Except as otherwise provided in this act every male citizen of the United States *and every other male person residing in the United States* who is between the ages of 18 and 45 at the time fixed for his registration, shall be liable for training in service in the land or naval forces of the United States." (Italics ours.)

It is to be seen that the duty of service was imposed on citizens and resident aliens but not on non-resident aliens.

Section 401(j) of the Nationality Act was enacted on September 27, 1944, about half-way through the period of draft evasion with which appellee was charged. According to 401(j), appellee became a non-resident alien as of that date.

But we have just seen that such non-resident aliens were not liable for military service. *Therefore when the Government charged appellee with draft evasion between September 27, 1944, and November 1946, and when the trial court subsequently found him guilty of draft evasion during the same period, it followed inexorably that appellee was thereby adjudged to be still a citizen of the United States. The judgment of conviction presupposed that appellee had not been denationalized under 401(j).*

We urge that the Government is estopped now to deny, by virtue of the foregoing, that appellee is a citizen of the United States or that he is entitled to the declaratory relief that he seeks.

Where a fact or determination is *necessarily comprehended* in a judgment, even though the judgment

does not explicitly contain it, the judgment is a bar under the doctrine of *res adjudicata* or collateral estoppel. (*Washington A & G Steam Packet Co. v. Sickles*, 5 Wall. 580; 18 Law. Ed. 550.) In the present case the trial Court in the criminal proceeding could not have found appellee guilty of draft evasion between September 27, 1944, and November 1, 1946, without concluding that he was a citizen of the United States.

Collateral estoppel may arise from a criminal proceeding to estop a party in a subsequent civil action. (*Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 95 Law. Ed. 534.) The estoppel may arise no less against the United States, in its capacity as plaintiff. (50 Corpus Juris Secundum 370.) And the estoppel is equally a bar to the Government if the law in the first action were erroneously applied to the facts, as long as there was a determination of a "fact, question or right": *United States v. Moser*, 266 U.S. 236, 60 Law. Ed. 262. The Court in *Moser* concluded: "A determination in respect to the status of an individual upon which his right to recover depends, is as conclusive as the decision upon any other matter."

It is no answer to say that appellee's offense from 1942 to the enactment of 401(j) in 1944 would alone have supported the penalty imposed on him. (Thus presumably invoking the rule in *Roviaro v. U. S.*, 353 U.S. 53, 1 Law. Ed. 2d 639.) It is not the imposition of the penalty as such which we are concerned with here; it is the legal impact of a substantive finding as

to appellee's citizenship status which is implicit in the judgment of conviction.

The foregoing point, however, draws attention to an aspect of the collateral estoppel now invoked which lends additional force to it. What appellee uses here is no mere hypertechnical exercise in logic. He relies on a determination by the original trial judge *on the basis of which he actually suffered punishment.* If the trial court had found that the extent of his offense was from 1942 to 1944, instead of 1942 to 1946, it seems an inevitable inference that the penalty imposed would have been mitigated accordingly. The trial court in its memorandum opinion asserts that there is nothing in the record to sustain this contention. We urge that the trial court erred in this regard because the inference is clearly there to be drawn. Any judge in any court seeking to do justice will consider, in meting out punishment, not only the *kind* of offense but the *extent* of it. It is one thing to evade the draft for a single day; it is quite another thing to evade it for a year. Correspondingly it is one thing to commit the offense for two years and it is another to commit it for four.

The government has sought to avoid this result by arguing that appellee was guilty of a "continuing" offense, so that he was in violation of the Selective Service Act from 1944 to 1946, but he continued to absent himself from the United States. But this is to confuse a *continuing offender* with one who, after the commission of the offense, continues to be a *fugitive*. If appellee lost his citizenship in 1944, at a time

when he was a non-resident of the United States, he became a non-resident alien and as such legally exempt from the requirement of military service. But having been punished as a citizen of the United States, appellee deserves to be treated as no less now that he has paid the penalty. The Government should not now be heard to deny the fact of his citizenship.

II

SECTION 401(j) FAILS TO MEET THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OF LAW.

In reconsidering this case after the present remand, the trial court wrote:

> "In addition to the views expressed in my memorandum and order of September 24, 1958, I construe Section 401(j), which provides for automatic divestiture of citizenship, as essentially penal in character, and deprives the plaintiff of procedural due process. In my view the requirements of procedural due process are not satisfied by the administrative hearing of the Immigration Service nor in this present proceedings."

We urge that it may well be that the view thus expressed by the trial court should be finally determinative here. It seems to us that it would be wholly consistent to adopt the view expressed by Mr. Justice Frankfurter, dissenting in *Trop v. Dulles*, that the "awesome power of this Court to invalidate . . . legislation . . . must be exercised with the utmost restraint", and yet at the same time scrutinize with

painstaking care the procedural manner in which the will of Congress is exercised. If it can be shown that the present statute is procedurally defective, there will be no need to reach the ultimate question of the extent of Congressional power in this area.

It is not difficult to get to the nub of the problem: The question is really whether Section 401(j) is in truth penal and punitive in nature. If it is found to be so, the absence of the procedural safeguards guaranteed in criminal proceedings is self-evident. Section 401(j) lacks even the protection of the right to trial by court-martial afforded by Section 401(g). Citizenship is taken away *ipso facto*, and there is no colorable basis for arguing that the civil remedy of declaratory relief which is the subject of the present action can redress the manifest original infringement upon due process.

When the form is pierced to find the substance, Section 401(j) emerges as plainly penal in nature rather than merely "regulative". We urge that the following factors cumulatively require this conclusion:

A. Ostracism, or banishment, was among the earliest of the primitive punishments devised by man. Its abandonment was a relatively recent development in the administration of justice, one usually regarded as a triumph of enlightenment over the traditions of barbarism.[1]

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[1]There is pertinent text material on this subject in "Punishment and Reformation" by Frederick Howard Wines, Chapter V "Intimidation and Torture", particularly at pages 85 and 86.

It is ironic to see designated as mere "regulation" in this day that which was among the harshest and least humane of punishments during the greater part of recorded history.

It is not sufficient to argue that aliens in this modern day are accorded many of this country's legal protections. The facts of the instant case are answer enough. Citizenship is first of all the right to be here, to remain here. If Mendoza is deported to Mexico according to the terms of the deportation order already outstanding against him, he will be cast adrift in the world as surely as were those in ancient times whose banishment was considered tantamount to death.

B. Moreover, Congress has historically labeled the loss of the rights of citizenship as a "penalty". The 1865 Act (13 Stat. 490) frankly so denominated it, and this Court so described it in *Kurtz v. Moffitt*, 115 U.S. 487, 501.

C. The legislative history of the present statute is also confirmatory. At 90 Congressional Record 7629, Senator Russell spoke as follows:

> "Information before the committee indicated that on one day several hundred persons departed from the United States through the city of El Paso, Tex., alone, in order to avoid service in either the Army or the Navy of the United States, and to avoid selection under the selective-service law. This bill provides that any person who is a national of the United States, or an American citizen, and who in time of national stress departed from the United States to another

country to avoid serving his country, shall be deprived of his nationality.

It further provides that any alien who is subject to military service under the terms of the Selective Service Act, and who left this country to avoid military service, shall thereafter be forever barred from admission to the United States.

Mr. President, I do not see how anyone could object to such a bill. An alien who remains in the country and refuses to serve in the armed forces in time of war is prosecuted under our laws, and if found guilty he is compelled to serve a term in the penitentiary. Under the terms of the Selective Service Act an American citizen who refuses to serve when he is called upon to do so is likewise subject to a prison term. Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, should be penalized in some measure. This bill would deprive such persons as are citizens of the United States of their citizenship, and, in the case of aliens, would forever bar them from admission into the United States. Any American citizen who is convicted of violating the Selective Service Act loses his citizenship. This bill would merely impose a similar penalty on those who are not subject to the jurisdiction of our courts, the penalty being the same as would result in the case of those who are subject to the jurisdiction of our courts."

Attention is also invited to the remarks of Representative Dickstein, Chairman of the House Immigration Committee, 90 Congressional Record 7725-26.

D. The actual source of this legislation is even more conclusive. It was not instigated at the request of the Secretary of War or Navy to implement the war powers, or at the request of the Secretary of State to implement the power to conduct foreign affairs. *It was instigated at the request of the Attorney General to punish certain draft delinquents who could not otherwise be reached.*

In this connection, it is impossible to improve upon the able discussion of the American Civil Liberties Union in their Amicus Curiae brief filed at the time of the prior hearing before this Court, and it is respectfully requested that this brief be restudied in its entirety. Most particularly attention is invited to the letter addressed by Attorney General Biddle to all United States Attorneys on the subject of the practical administration of Section 401(j) (Amicus Curiae Brief of American Civil Liberties Union, page 33).

E. Finally, we contend that this question is now behind us: The question of whether Section 401(j) is punitive and penal in nature was determined for practical purposes by this Court in *Trop v. Dulles*, 356 U.S. 86. Both Mr. Chief Justice Warren speaking for four members of the Court, and Mr. Justice Brennan concurring, were plainly and unequivocally of the view that Section 401(g), concerning the military deserter, is a penal and punitive measure. This being the settled judgment of this Court, it cannot sensibly be urged that Section 401(j), the Statute here being challenged, has any other status. To strike down the denationalization of a soldier fleeing

from duty as unconstitutional while upholding the imposition of the same sanction on a civilian fleeing the country to avoid military duty prior to his induction, on the ground that one is punitive while the other is merely regulative, would be to impose an indefensible distinction.

On the basis of the foregoing, it is submitted that Section 401(j) should be determined to be penal and punitive in nature, and as such, on its face, violative of procedural due process of law.

CONCLUSION

In addition to the grounds heretofore advanced to sustain our contention that the statute challenged here is inherently unconstitutional, we urge that on the foregoing more specialized grounds the judgment for appellee should be affirmed.

Dated, Bakersfield, California,
September 16, 1961.

Respectfully submitted,
Di Giorgio and Davis,
By Thomas R. Davis,
Fischer, Willis & Panzer,
By John W. Willis,
Attorneys for Appellee.

IN THE

Supreme Court of the United States

October Term, 1961

No. [illegible]

ROBERT F. KENNEDY, Attorney General of the United States,

Appellant,

v.

FRANCISCO MENDOZA-MARTINEZ,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Northern Division

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

JACK WASSERMAN,
DAVID CARLINER,
Attorneys for American Civil Liberties Union,
902 Warner Building,
Washington 4, D. C.

Of Counsel:
ROWLAND WATTS,
STEPHEN J. POLLAK,
OSMUND K. FRAENKEL.

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Appellee.

On Appeal From the United States District Court for the Southern District of California, Northern Division

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties, filed with the Clerk of this Court.

The American Civil Liberties Union, a national non-profit organization established in 1920, is committed to the inseparable purposes of preserving the democratic principles for which our government was established and to maintaining our civil liberties. Together with all Americans who prize the blessings of United States citizenship and the privileges of freedom which it brings, it seeks to guard against arbitrary deprivations of our birthrights.

It believes that there has been an increasing tendency on the part of Congress, through expatriation laws, to encroach upon the right of American citizenship given to individuals under the Fourteenth Amendment to our Constitution. It submits this brief in an effort to assist the Court in its analysis of this encroachment and the constitutional problems thereby raised.

Statute Involved

The Nationality Act of 1940 as amended (54 Stat. 1137, 58 Stat. 4, 746; 8 U. S. C. 801) provided:

> "Section 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * *
>
> "(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

Question Presented

As *amicus* believes that the issue of collateral estoppel will be fully discussed in appellee's brief, we confine our discussion to the underlying constitutional question, *i.e.*, Is the provision of 401(j) of the Nationality Act of 1940 decreeing forfeiture of citizenship by a native-born American who remained outside the United States to avoid military service, within the constitutional power of Congress?

Statement of Case

Appellee, Francisco Mendoza-Martinez, born in the United States in 1922, became a citizen of the United States and of Mexico at birth. In 1942 he departed for Mexico for the purpose of evading service in the Armed Forces of the United States. His return to the United States in 1946, was followed by a conviction in 1947 upon a plea of guilty for violation of Section 11 of the Selective Service and Training Act of 1940 (50 U. S. C. App. 311). In 1953 appellee was ordered deported as an alien. This declaratory judgment action was filed in the United States District Court for the Southern District of California pursuant to 8 U. S. C. 903 to establish his claim to American citizenship. In a memorandum and order filed September 24, 1958, the District Court, following the reasoning of this Court in *Trop* v. *Dulles*, 356 U. S. 86, ruled that 401(j) of the Nationality Act of 1940 was unconstitutional and that the appellee was therefore entitled to a declaration of citizenship.

This Court, in *Mackey, et al.* v. *Mendoza-Martinez*, 362 U. S. 384, remanded the cause to the District Court for consideration of the issue of collateral estoppel. On such remand the United States District Court (S. D. Cal., N. D.) held that there had been no estoppel "by virtue of the criminal indictment and conviction of the plaintiff for draft evasion, or for any other reason, from asserting that the plaintiff has lost his * * * United States nationality and citizenship" and again affirmed its preceding unreported memorandum decision that "Section 401(j) of the Nationality Act of 1940 * * * is unconstitutional, both on its face and as applied to the plaintiff herein." (*Mendoza-Martinez* v. *Rogers*, 192 F. Supp. 1, at p. 2). From this decision the appellant has taken the instant appeal.

Summary of Argument

Section 401(j) of the Nationality Act of 1940 was constructed from the same mold as 401(g), which this Court found invalid in *Trop* v. *Dulles*, 356 U. S. 86. The Attorney General and Congress relied upon the Civil War statute of March 3, 1865 (13 Stat. 490, 37 Stat. 356) as amended, for precedent in the enactment of 401(j). House Report 1229, 78th Cong., 2nd Sess., p. 2. It likewise was the precedent for 401(g). The cases all recognize this Civil War statute as being highly penal. *Huber* v. *Reily*, 53 Pa. St. 112 (1866); *Kurtz* v. *Moffitt*, 115 U. S. 487, 501; *Trop* v. *Dulles*, 356 U. S. 86, 94, 108.

The specific legislative history of 401(j), moreover, reveals the express and sole purpose of Congress to punish the draft delinquent. Congressional leaders stated this as their objective in the debates leading to the passage of the statute, 90 *Cong. Rec.* 3261-2, 7629. The Department of Justice regarded expatriation and banishment from the United States as the proper substitute for criminal prosecution of the draft evader who absconded to foreign shores. Department of Justice Circular No. 3893, December 5, 1944, see Appendix, *infra*. This is the appellant's purpose here: to impose upon the appellee, a citizen of the United States by birth, expatriation, banishment and criminal punishment. However, the expatriation and banishment would be imposed not as part of the criminal conviction—because none is required under the statute—and without any of the safeguards of a civil or criminal trial.

The punishment of expatriation and banishment sought to be meted out to appellee is the naked vengeance, the prescription of reprimand without rehabilitation, which is condemned in the *Trop* case. Trop might reenlist or become reactivated during wartime and regain his citizenship [8 U. S. C. 801(g), 8 U. S. C. 1481(a)(8)]. No statutory provision exists for restoration of citizenship

for the draft delinquent who has departed to avoid military service or training. He is not only expatriated but permanently barred from the United States and all his ties here. 8 U. S. C. 136(d)(1); 8 U. S. C. 1182(a)(22).

The imposition of exile and expatriation for the draft delinquent find no justification in the foreign affairs powers. Neither the history of 401(j) nor the background of this case reveal any foreign involvement, any defection to a foreign power, or any political allegiance to another country other than the law-abiding presence of a dual national in the country of one of his nationalities. There is no more reasonable relationship to the war powers in expatriating the draft delinquent than the deserter. Indeed, if distinctions are to be made, Section 401(j) finds less support in the war powers, for as contemporaneously construed by the Attorney General who sought its passage, it was intended to bar the return of draft delinquents to the United States, instead of to encourage their service in the armed forces. Expatriation and exile permanently preclude the draft delinquent from changing his mind or seeing the error of his ways. Expatriation and exile of the draft delinquent are not a proper exercise of sovereignty any more than they are a proper function of the war power or the power to conduct foreign relations.

Finally, since the penalty of denationalization may be imposed without a prior conviction for the proscribed conduct, Section 401(j) comes within the ban of *Huber* v. *Reily, supra,* and *Kurtz* v. *Moffitt, supra.* None of the safeguards of a criminal trial are afforded an expatriated citizen before the sanction is imposed against him. And while he is not deprived of his right to assert his citizenship in the courts of the United States, the citizen abroad who has been denationalized will either be limited to a trial *in absentia,* or must submit himself as an alien in the administrative agencies and courts of the United States with all of the disabilities which that status entails. 8 U. S. C. 1227,

1503. Although the handicaps of the expatriated citizen who is in the United States are not as severe, the initial burden is upon him to prove his citizenship, as the appellant concedes (Appellant's Brief, p. 52) rather than upon the Government to establish denationalization.

The expatriation of a national of the United States, in these circumstances, is a denial of due process.

Argument

Before turning to the background of Section 401(j) of the Nationality Act of 1940 and the constitutional issues it presents, we summarize briefly the historical development of the American expatriation laws for a fuller understanding of the concepts which gave rise to those laws.

Originally an individual was denied the right to expatriate himself without the consent of his soverign. The right to become an expatriate, without regard to the sovereign's will, was thereafter proclaimed as a natural and inherent right of all people (15 Stat. 223). However, the right was denied during wartime and was also not extended to those under twenty-one. It was also denied to our citizens as long as they remained in the United States.

With the enactment of the Nationality Act of 1940, earlier limitations were cast aside. Congress authorized expatriation in several cases without departure to foreign shores. Wartime expatriation was sanctioned as was the expatriation of persons under twenty-one. Previously, the individual fought his sovefign for the right to cast off his citizenship. After 1940, it was the sovereign who fought for the right to impose expatriation upon the individual. Originally, expatriation was the voluntary abandonment of citizenship. *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491; and *Perez* v. *Brownell*, 356 U. S. 44, each sustained specified overt acts

as evidence of a voluntary relinquishment of United States citizenship but only where it involved a nexus with a foreign sovereignty.

Here the appellant seeks to expatriate a citizen for the performance of proscribed acts, even if it does not evince attachment to a foreign government. How far may the Government proceed in compelling a native-born citizen to become an expatriate against his will, under what circumstances may it do so, and to what constitutional safeguards is the citizen entitled? These are the issues posed by this litigation.

A. The American Doctrine of Expatriation

The American colonists came to these shores with a background of English common law which included the doctrine that citizenship was immutable. Under this doctrine, no man might abjure his native country nor the allegiance which he owed his sovereign. *Coke's Littleton*, 129(a); *MacKenzie* v. *Hare*, 239 U. S. 299; 9 *Op. Atty. Gen.* 356. This common law principle, of course, resulted in conflicting claims to the allegiance of individuals who became naturalized under our laws. It was the subject of controversy between the United States and Great Britain,[1] between Jefferson and Hamilton [2] and between members of the judiciary of the various state courts.[3]

Thomas Jefferson, the great exponent of the theory emphasizing the rights of the individual as against those of the government, was the first American to advocate the

[1] The impressment of British seamen who had become Americans was one of the causes of the War of 1812. *II Richardson, Messages and Papers of the Presidents*, p. 485.

[2] *Tsiang, The Question of Expatriation in America Prior to 1907*, p. 28. Hamilton believed that the right of expatriation would encourage desertion and was, therefore, subversive of government. *IV Works of Alexander Hamilton*, p. 256.

[3] *Tsiang, supra*, pp. 69-70.

principle of expatriation. In 1779 he drafted the Virginia law code, in which expatriation was declared to be:

> "a natural right which all men have of relinquishing the country in which birth or other accident may have thrown them, and seeking subsistence and happiness wheresoever they may be able, or may hope to find them."[4]

In 1868; Congress acknowledged that the rights of the individual prevailed over the sovereign's claim to perpetual allegiance. The Act of July 27, 1868 (15 Stat. 223) declared that "the right of expatriation is a natural and inherent right of all people."

Responding to Presidential requests,[5] the Expatriation Act of 1907 (34 Stat. 1228) defined the methods by which expatriation might be accomplished. Naturalization in a foreign state and subscription to a foreign oath of allegiance were the two recognized means of expatriation under this law. Expatriation during wartime was forbidden. The theory behind this prohibition was that in time of war "the Government should be able to control the services of every citizen, and the right of changing allegiance should not exist when the State is in peril." *House Doc. 326*, 59th Cong., 2nd Sess., p. 28. Secretary of State Fish said:

> "to admit the right of expatriation, 'flagrante bello', would be to afford a cover to desertion and reasonable aid to the public enemy."

The Nationality Act of 1940, as amended (54 Stat. 1137, 58 Stat. 4, 58 Stat. 677; 8 U. S. C. 802) expanded the grounds of expatriation for native-born citizens to include foreign military service, foreign civil service, voting in foreign

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[4] *Tsiang, supra*, pp. 25-56.

[5] See annual messages of Presidents Grant, Cleveland and Theodore Roosevelt in 1873, 1884, 1885 and 1904. *Richardson, Messages and Papers of the Presidents*, Vol. VII, pp. 239, 291, Vol. III, p. 336, Supp. 2 (Lewis), p. 851.

elections, renunciation before a consul abroad, renunciation during wartime, draft dodging, treason and desertion. Wartime expatriation was no longer barred. On the contrary, expatriation for desertion, draft dodging and by renunciation in the United States [8 U. S. C. 801(g), (i) and (j)] might only take place during wartime or a national emergency. Expatriation for desertion, treason and by renunciation during wartime [8 U. S. C. 801(g), (h) and (i)] was not dependent upon departure from the United States. Congress, however, acknowledged that "Ordinarily, departure from the country of which a person has been a national is regarded as an essential element of expatriation". *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980*, 76th Cong., 1st Sess., p. 492. The age of expatriation was reduced from twenty-one to eighteen, *Hearings, supra*, pp. 492, 493.

The Immigration and Nationality Act of 1952 (66 Stat. 267; 8 U. S. C. 1481) substantially reenacted the expatriation provisions of the 1940 Act. Under the 1952 Act violation of the Selective Training and Service Act creates a presumption that departure from the United States was for the purpose of evading the draft. 8 U. S. C. 1481(a)(10). By amendment in 1954, conviction for communist activity has been added as a ground of expatriation. 68 Stat. 1146; 8 U. S. C. 1481(a)(9).

Throughout the years, we have, therefore, steadily increased the statutory grounds for expatriation. Today, we have more stated grounds for expatriation than any other country in the world.[6] Other countries, particularly

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[6] Under the 1952 Immigration and Nationality Act (8 U. S. C. 1481, 1482) there are twelve stated grounds for the expatriation of native-born citizens. Most foreign countries recognize foreign naturalization as a ground of expatriation. Only Liberia and the Philippines appear to recognize the taking of a foreign oath as a basis for expatriation. Andorra alone authorized expatriation for participation in a foreign election. Only four countries (Bulgaria, Greece, Poland and Turkey) sanction expatriation upon the ground of draft evasion, *Laws Concerning Nationality* (United Nations Legislative Series, 1954).

the dictatorships may be more arbitrary in depriving their citizens of their birthright.[7] We, on the other hand, have recognized that expatriation is a natural right of the individual and that it is his "voluntary renunciation or abandonment of nationality and allegiance" which is the essence of this natural right. *Perkins* v. *Elg*, 307 U. S. 325, 334.

B. Background of Enactment of 401(j) of the Nationality Act of 1940

On March 3, 1865, before the right of expatriation was recognized as natural and inherent right of all people, Congress enacted a bill providing:

> "That, in addition to the other lawful *penalties* of the crime of desertion * * * all persons who have deserted the military or naval service of the United States, * * * shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship * * * and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the *penalties* of this section." (Emphasis supplied.) 13 Stat. 490.

In *Trop* v. *Dulles*, 356 U. S. 86, 89, this Court observed that the meaning of the phrase "rights of citizenship" was not entirely clear. No case was ever presented under the 1865 Act in which an attempt was made to deport a violator of its provisions.

What is clear, however, is that the 1865 Act prescribed penalties. The language of the Act so states. The first and leading case under the Act was *Huber* v. *Reily*, 53 Pa.

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[7] In the Union of the Soviet Socialist Republics expatriation may be decreed by order of the Presidium of the Supreme Council. *Laws Concerning Nationality*, *supra*, p. 463.

St. 112 (1866) in which Judge (later Mr. Justice) Strong noted that the Act was "highly penal" and that the penalty of forfeiture of citizenship could not be imposed without providing the constitutional safeguard given the accused in a criminal proceeding. He said:

> "It (the act) means that the forfeiture which it prescribes, like all other penalties for desertion, must 'be *adjudged* to the convicted person, after trial by court-martial, and sentence approved.'"

The decision was later approved, and its result adopted by this Court. *Kurtz* v. *Moffitt*, 115 U. S. 487, 501. In submitting the draft of the 1940 Nationality Act to Congress, the Secretary of State, the Attorney General and the Secretary of Labor referring to Sections 1996 and 1998 of the Revised Statutes which replaced the Act of March 3, 1865, stated:

> "The provisions of Sections 1996 and 1998 are distinctly penal in character." *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980*, 76th Cong., 1st Sess., p. 492.

In 1912 the 1865 statute was amended to make it inapplicable in time of peace (37 Stat. 356) and it remained in effect until repealed by the Nationality Act of 1940 (54 Stat. 1172).

During World War II, the Department of Justice discovered:

> "that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore, citizens who had crossed the border into Mexico for the purpose of evading the draft * * *." *House Report 1229*, 78th Cong., 2nd Sess., p. 2.

Beset with the problem of punishing these draft delinquents, the Attorney-General determined to expatriate and

banish them from the United States by permanently barring their return. This would both punish such persons for their crime as well as eliminate the expense incident to criminal prosecution and the inconvenience of keeping their files open. J. P. Sharon of the Immigration and Naturalization Service writing on *Loss of Citizenship by Draft Dodgers* in the Monthly Review of the Service for February, 1948, page 97, makes this clear:

> "In the Fall of 1943, the Department of Justice took stock of the numerous cases of citizens who had registered with their local draft boards and departed from the United States. They declined to return to this country when called upon to do so. * * * By such action, these individuals sought to elude United States military service and to escape prosecution for violation of the Selective Training and Service Act of 1940 as amended. The Attorney General noted that these persons could not be extradited and that prosecutions for violation of the 'draft' act would have to wait upon the return of these draft dodgers to our jurisdiction. It was felt that such draft delinquents were unworthy of citizenship.
>
> "In a report to Congress, the Attorney General brought the above situation to its attention and recommended legislation looking to the expatriation of such draft delinquents, as well as to their exclusion from the United States when they attempted to return. By such action, the expense incident to their prosecution for 'draft' violations would be obviated."

On February 16, 1944, the Attorney General addressed a letter to the Chairman of the Senate Immigration Committee, calling his attention to the many citizens who had left the country to avoid military service. He stated:

> "While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it

> would seem proper that in addition they should lose their United States citizenship. Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any existing grounds.
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> • • •
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> "Adequate precedent exists for the suggested legislation in that during the First World War a statute was in force which provided for the expatriation of any person who went beyond the limits of the United States with intent to avoid any draft into the military or naval service (37 Stat. 356)."[8] *House Report 1229, supra*, pp. 2-3.

The Attorney General thus invoked the "highly penal", 1865 Act (as amended in 1912) as precedent for the statute which became 401(j) of the Nationality Act of 1940. Contrary to appellant's claim (Br. 55-56), he made no distinction between the punitive nature of prosecutions for violations of the Selective Service Act and the loss of citizenship which he sought to impose.

Neither in the reports of the Immigration Committees (House Report 1229, Senate Report 1075, 76th Congress, 2nd Session) nor in the Congressional debates is a word mentioned about foreign involvements or the exercise of the war powers. On the contrary, members of Congress affirmatively indicated that the legislative purpose of the measure was punishment of draft delinquents. Nor, is the Congressional purpose established, as appellant intimates (Br. 55-56), by mere "individual references" in "colloquial language" and "common parlance" to "penalties" by isolated congressmen. The Representative and Senator who were responsible for the legislation in Congress stated its purpose in categorical language.

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[8] Identical language was employed in a letter of the Attorney General to the Director of the Bureau of the Budget on September 18, 1944.

Chairman Dickstein of the House Immigration Committee who piloted the bill through the House of Representatives stated:

> "I would classify this piece of legislation as a bill to denaturalize and denationalize all draft dodgers who left this country knowing that there was a possibility that they might be drafted in this war * * *.
>
> * * *
>
> "Any man, any American, who leaves this country for the purpose of not serving in time of war is a traitor, in my judgment." 90 Cong. Rec. 3261-2.

Senator Russell, Chairman of the Senate Immigration Committee, likewise observed on the floor of the Senate (90 Cong. Rec. 7629):

> "Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, should be penalized in some measure."

From the statements of the executive authors of the legislation, as well as from the Congressional sponsors, it is evident that Section 401(j) had no non-penal objectives whatever. There was no relief sought from "embroilments with foreign nations" (Br. 54). There was no objective "to persuade the evading fugitive to return to perform his service" (*ibid.* 54-55). See *infra* under Point III. Least of all was there an intent to "regulate" the draft evader (*ibid.*, 55, 57). Indeed, his expatriation is the very abnegation of regulation.

Section 401(j), based on the precedent of a punitive Civil War and World War I statute, it seems plain, has a single, exclusive purpose—to visit an additional punishment upon those persons who fled the United States during time of war to avoid service in this country's armed forces.

I

Section 401(j) Imposes a Punishment Barred by the Eighth Amendment.

In *Trop* v. *Dulles*, 356 U. S. 86, four members of this Court held that denationalization could not be inflicted as punishment for desertion, that substance rather than the form of the statute controlled, that the nature of the statute depended upon the evident purpose of the legislature, and that "denationalization as a punishment is barred by the Eighth Amendment." Mr. Chief Justice Warren observed in his opinion at pages 93-94:

> "Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401(j) of the Nationality Act, decreeing loss of nationality for evading the draft by remaining outside the United States. While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguard of an adjudication of guilt by court martial."

In answer to the distinctions which appellant attempts to make between the instant case and *Trop* v. *Dulles*, we submit the following comments:

1. The Civil War and World War history of 401(j) is identical with that of 401(g). As this Court recognized in the case of *Trop* v. *Dulles*, these antecedents were highly penal and loss of citizenship, like other penalties, only followed a conviction.

2. With the codification of the Nationality Laws in 1940, the paths of the two sections parted. While expatriation was continued for deserters in 401(g), the Cabinet Com-

mittee which submitted the proposed codification to Congress omitted that section of the Act of March 3, 1865 (13 Stat. 490) which provided for expatriation of draft evaders. Although Congress enacted the Selected Training and Service Act on September 16, 1940, and adopted the codification of the Nationality Laws a month later in the same session on October 14, 1940, it did not at that time provide for the expatriation of draft delinquents.

Thus, whatever significance may attach to the fact that the "expert Cabinet Committee on which Congress quite properly and responsibly relied * * * stated that the provision in question 'technically is not a penal law'" [See *Trop*, Dissenting Opinion of Mr. Justice Frankfurter, 356 U. S. at 125 (fn. 4)] is not available here. Section 401(j), as we have noted above, became a part of the Nationality Act at the request of the Attorney General whose concern was solely to impose an additional penalty upon draft evaders. The Congressional debate reaffirmed this purpose.

The history of 401(j), therefore, as detailed above in Point B, reveals a distinct and definite Congressional purpose to punish the draft evader, even were one to assume that 401(g) had no such purpose. Extradition was not possible for draft evaders who went to foreign shores. Accordingly, in lieu of extradition and criminal prosecution in the United States, they were to be punished by denationalization and permanent exclusion from the United States. This is so because under Section 3 of the Immigration Act of 1917, as amended [58 Stat. 746, 8 U. S. C. 136(d)(1)] and Section 212(a)(22) of the Immigration and Nationality Act [66 Stat. 184, 8 U. S. C. 1182(a)(22)], persons who have been guilty of draft dodging by departure from the United States are permanently barred from entering the United States.

The language of Mr. Chief Justice Warren, in the *Trop* case is particularly pertinent here (356 U. S. at pp. 96-97):

> "If the purpose of the statute imposes a disability for the purpose of punishment—that is, to reprimand

> the wrongdoer, to deter others, etc., it has been considered penal.
>
> * * * * Plainly legislation prescribing punishment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute."

The imposition of loss of citizenship for the draft evader who leaves the United States is likewise clearly a penalty.

3. Although appellee, Mendoza-Martinez, was convicted of draft evasion, such conviction is not a necessary or essential prerequisite for a finding of expatriation. See *Perez v. Brownell*, 356 U. S. 44, *Matter of C. A.*, 2 I & N Dec. 378.

4. Expatriation was not imposed herein as a consequence of the draft evasion conviction but rather as a result of the administrative finding by the Board of Immigration Appeals that appellee had departed and remained outside the United States for the purpose of evading the draft.

The crime of draft evasion as defined in the statute (50 U. S. C. App. 311) does not include all of the elements required by Section 401(j). This appellee's conviction would not support his expatriation in the event Section 401(j) provided for a criminal trial.

5. Appellant seeks to avoid the application of the *Trop* case, upon the ground that appellee in the instant case is a dual national, and upon the basis that the relatively few litigated cases (the number of which is not disclosed) all involved dual nationals.

The short answer to this contention is that the statute applies equally to those persons who are dual nationals and to those who possess only American citizenship. (See Department of Justice Circular No. 3893, reproduced in

the Appendix.) For those who are not dual nationals, the statute produced statelessness, with all the fears and loss of rights noted by this Court in the *Trop* case. Whether a dual national or a single national, the statutory scheme would visit expatriation, banishment and exile. Madison's Report on the Virginia Resolution on the Alien and Sedition Laws, 4 *Elliott's Debates*, 455. This naked vengeance, in the words of Mr. Justice Brennan:

> "* * * constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into useful paths of society, it excommunicates him and makes him, literally, an outcast." 356 U. S. 86, at 111.

As in the *Trop* case, therefore, it stretches the imagination to establish a rational relation of mere retribution to the ends purported to be served by the expatriation of the draft dodger.

6. The factor which we believe does distinguish *Trop* from the present case reinforces our position that denationalization here violates the Eighth Amendment as a cruel and unusual punishment. The dissenting opinion of Mr. Justice Frankfurter (*Trop*, 356 U. S., at 125) suggests that denationalization cannot be said to be a cruel and unusual punishment for an offense that is capital. If this is true, it seems needless to argue that to impose statelessness and exile upon the appellee is indeed a punishment, and one that is cruel and vengeful, in relation to an offense for which the maximum penalty is five years confinement and $10,000 fine. (Section 11, Selective Training and Service Act of 1940, 54 Stat. 894; 50 U. S. C. App. 311.) See *Weems* v. *United States*, 217 U. S. 329; *O'Neil* v. *Vermont*, 144 U. S. 323; "The Expatriation Act of 1954", 64 Yale Law Journal 1164, fn. 131 at p. 1188.

II

Expatriation and Exile of the Draft Delinquent Is Not Justified by the Exercise of the Foreign Affairs Powers.

Perez v. *Brownell*, 356 U. S. 44, sustained the expatriation of an individual who voted in a foreign political election upon the ground that the statute was a valid exercise of the foreign affairs powers of Congress. The statutory history revealed Congressional concern over participation by Americans in the polities of foreign countries. "Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States * * *." *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980*, 76th Cong., 1st Sess., p. 491.

Unlike the legislative background of 401(e), the history of Section 401(j) discloses no concern at all by Congress or by the Executive with any impact the problems of fugitive draft evaders might have had upon our international relations. The guidance which Congress received from the Executive, and upon which it relied, came not from the State Department, which one might suppose to be its source were the problem a matter of foreign affairs (*Perez* v. *Brownell*, 356 U. S. 44, 56), but came rather from the Attorney General, whose sole, stated concern was to impose loss of citizenship, *in addition* to liability to prosecution upon "persons who are unwilling to perform their duty to their country and abandon it during its time of need". H. Rep't 1229, 78th Cong., 2nd Sess., pp. 2-3.

The letter which the Attorney General wrote to Congress referred to draft delinquents "who had crossed the border into Mexico for the purpose of evading the draft" but it

contained no reference to any issues this may have posed for United States-Mexican relations. No suggestion at all is made that "international complications" (Appellant's Brief, p. 38) had been caused by the fugitive draft evaders. Although many of the fugitives, like the appellee, were dual nationals, the Executive sponsor of the legislation was utterly silent as to any question regarding foreign allegiance of the draft evaders.[9]

Appellant nonetheless argues that the "potentiality of foreign embroilment through fugitive draft evaders is not fanciful", and he suggests that the statute is reasonably related to the foreign affairs power because "the termination of citizenship terminates the (international) problem." (Brief, pp. 41-44, citing *Perez*, 356 U. S. at 60.)

The impediment in the appellant's argument is that whatever embroilment may follow from the problem of fugitive draft evaders is neither caused by their United States citizenship nor is it solved by expatriation. The obligation to serve in the armed forces was imposed not merely upon citizens but upon "every other male person residing in the United States", within certain age limits. Selective Training and Service Act of 1940, Section 3(a); 54 Stat. 885; 50 U. S. C. App. 303(a). Cf. *McGrath* v. *Kristensen*, 340 U. S. 162.

The fugitive who flees the United States to escape the draft may, therefore, be a resident alien as well as a citizen, 32 C F. R., 611.12. International problems might well arise, as appellants suggest, if other nations became "refuges or centers for American draft evaders" (Brief, p. 38). But

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[9] In contrast to State Department and Congressional silence on any international implications arising from the flight of fugitive draft delinquents between 1940, when the Nationality Act went into effect, and 1944, when Section 401(j) was enacted, both the Secretary of State and Congress directed attention to other aspects of the Selective Training and Service Act which did have international repercussions. Cf. *Moser* v. *United States*, 341 U. S. 41.

the basis for protest would be the grant of refuge for draft delinquents whether citizens or not. Such does not exist here.

The possible repercussions upon United States relations with a foreign country which harbored violators of our laws would not be different if the fugitives were rumrunners (see especially *Ford* v. *United States*, 273 U. S. 593), or tax evaders, bank robbers, narcotic offenders (see concurring opinion of Mr. Justice Brennan in *Trop*, 356 U. S. at 113), spies (Cf. *Rosenberg* v. *United States*, 346 U. S. 273), saboteurs and manufacturers of defective war material (Cf. 18 U. S. C. 2151-2156), persons who obstruct the draft or interfere with the armed forces (Cf. *Schenck* v. *United States*, 249 U. S. 47), plotters against friendly foreign governments (Cf. *Wiborg* v. *United States*, 163 U. S. 632, and *Gayon* v. *McCarthy*, 252 U. S. 171), or pirates (Cf. *United States* v. *Smith*, 5 Wheat. 153), none of whom is denationalized by flight from the jurisdiction of the United States.

The nationality of the criminal is irrelevant to the offense. So, too, is the nationality of the draft delinquent. The offender's nationality is equally irrelevant to the effect which a foreign refuge for American law violators would have upon our relations with the country which offered such refuge. Clearly, it is the harboring of violators of our laws which would impair the relations, not the grant of refuge merely to those among the fugitive offenders who happened to be United States nationals.

The problem is not solved by denationalization. The fugitive draft evader is not relieved of his obligation to serve in the armed forces by his flight. Nor is he absolved of guilt for his crime, as the appellee's experience witnesses.[10]

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[10] Appellee, in the Government's view then an alien, was prosecuted and convicted for violation of the Selective Training and Service Act following his return to the United States.

The issue here, then, is not at all like that in *Perez*, where "termination of citizenship terminates the problem" because the expatriate's obligation to the United States is thereby dissolved and his involvement in foreign political elections is thereafter of no concern to this country. Termination of the appellee's citizenship terminates no international problem if in fact one exists. Termination of the appellee's citizenship performs one sole function—the one which Congress and the Attorney General intended—that of imposing upon him an additional punishment.

III

Expatriation and Exile for Draft Evasion Is Not a Proper Exercise of the War Powers.

We have noted in our historical summary that for many years expatriation could not take place during wartime. Secretary of State Fish feared that it would encourage desertion and aid to the enemy. Under 401(j) of the Nationality Act of 1940, instead of encouraging the citizen to return to the United States, instead of giving him another opportunity to serve his country, we denationalize and banish him forever. Under 401(g) restoration to active duty during wartime or reenlistment during wartime restored nationality. No comparable provision is made in 401(j). It is, therefore, obvious that rehabilitation was no concern of Congress in the enactment of the present statute.

The language of Mr. Justice Brennan in *Trop* v. *Dulles*, 356 U. S. 109, 113, relating to the deserter, is equally pertinent here to the draft evader:

> "It is difficult, indeed, to see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only punishment can follow, for the harm has been done. • • •

> "* * * it stretches the imagination excessively to establish a rational relationship of mere retribution to the ends purported to be served by the deserter. * * * As citizens we are also called upon to pay our taxes and to obey the laws, and these duties appear to me to be fully as related to the nature of our citizenship as our military obligations. But Congress' asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power."

The views of Mr. Justice Brennan find support, indeed, in the contemporaneous construction of the statute given by the Department of Justice. In its Circular No. 3893, issued on December 5, 1944, following the enactment of the statute, the Attorney General referred to the "substantial number of Selective Service delinquency cases involving aliens or dual citizens" who departed the United States for the "apparent purpose of evading military service".

As to these persons, the Attorney General declared:

> "It is anticipated that many such delinquents will attempt to return to the United States as the probability of being called for service becomes more and more remote. Under Public Law No. 431, such delinquents are ineligible for reentry, either as debarred aliens or expatriates, and in order that their cases may be closed in the offices of the United States Attorneys and the Federal Bureau of Investigation, the following procedure is suggested and authorized:
>
> "(1) The United States Attorney shall examine his file and the investigative reports in each case, and upon determination that Public Law No. 431 [78th Cong.] is applicable, shall close the case, and notify the Field Office of the Federal Bureau of Investigation of his action.
>
> "(2) Federal Bureau of Investigation will thereupon close its file in the case and furnish the Immigration and Naturalization Service with all information pertinent to the application of Public Law No.

> 431, and the application of the law from an administrative viewpoint, shall thereafter be the responsibility of the Immigration and Naturalization Service.
>
> "(3) The United States Attorney shall notify the State Director of Selective Service of the names, order numbers and Local Boards of all such closed delinquency cases so that his records and those of the Local Boards may be appropriately noted."

Thus the contemporaneous construction of the statute by the very Department which is charged with its enforcement establishes that its design was far from a "plan to provide equitably for the armed defense of the nation", as appellant claims, "at the time when military manpower is most needed," (Br. 45), and quite the opposite of "an effort to persuade the evading fugitive to return to perform his service or to submit to justice" (Br. 54-55). It was, on the contrary, a deliberate device to close the borders of the United States to those draft delinquent citizens who were expected to "attempt to return * * * as the probability of being called for service becomes more and more remote".

As to citizens of the United States, who do not have dual nationality, the Attorney General directed a different procedure. Their cases:

> "* * * should be continued in a pending status at the present time so that consideration may be given to the matter of prosecution in the event of subsequent apprehension in the United States. At the same time, however, the facts in all such cases should also be made available by the Federal Bureau of Investigation, to the Immigration and Naturalization Service and also, where appropriate, to the State Department."

For these persons, too, it is thus clear that they were to be excluded from the United States through the offices of the Immigration and Naturalization Service and the State

Department. It is only in the "event of [their] subsequent apprehension in the United States" that "consideration would be given to the matter of prosecution".

Appellant's argument that Section 401(j) is valid because of "its close and direct connection with the war power" (Br. 44-47), although it would seem to have facile support, is plainly without merit in the light of its expressed executive and legislative purpose (*supra*), as well as its contemporaneous administration construction. See *Power Reactor Development Co.* v. *IUE*, 367 U. S. 396 (1960); *Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1932).

Moreover, this argument is vitiated by the decision of this Court in *Trop*. The opinion of the Chief Justice for four members of this Court declared, even if the statute is an exercise of war power, that it must be judged as a penal law "because it imposes the sanction of denationalization for the purpose of punishing transgression of a standard of conduct prescribed in the exercise of that power". *Trop*, 356 U. S. at 97.

The concurring opinion there of Mr. Justice Brennan, at 114 which finds that expatriation of the wartime deserter from the armed forces lacks "the requisite rational relation • • • [to] • • • the war power" applies with even greater force here, where the draft evader, unlike Trop, the Army deserter, has never been subject to military discipline.

Nor, in view of the explicitly-stated purpose of the statute and its administrative construction, is the dissenting opinion in *Trop* support for the appellant's position here. For the opinion of Mr. Justice Frankfurter expressly finds that the expatriation of wartime military deserters may be deemed "needed in order that control may be had over evasions of military duty when the armed forces are committed to the Nation's defense, and that the deleterious

effects of those evasions may be kept to the minimum." *Trop* at 121.

As we have shown, the present statute had no such purpose. The contention, therefore, that expatriation of the draft evader may be sustained as a valid exercise of the war power should be rejected.

IV

Expatriation and Exile for Draft Evasion Is Not a Proper Exercise of Sovereignty.

Apart from the powers to regulate foreign relations and to conduct war, the appellant seeks to sustain Section 401(j) because it is said to derive from the "inherent rights of sovereignty" (Br. 47-51).

The Government's argument, we believe, is based upon erroneous premises. The appellant's first premise is that the right to expatriate flows from the right to enforce military duty. It seems obvious the power to raise an army by conscription is not the power to denationalize an unwilling conscript, any more than the power to tax is the power to expatriate. The opinions of Mr. Chief Justice Warren and of Mr. Justice Brennan in *Trop* dispose of the contention repeated here by the appellant that denationalization here "cannot be deemed arbitrary" because of the withdrawal of the individual from * * * acceptance of United States jurisdiction and of the citizen's obligation to support the nation in time of emergency" (Br. 50).

What applies to the express war power necessarily governs the powers which are inherent in sovereignty. Section 401(j) has no greater "rational relation" (*Trop*, concurring opinion of Mr. Justice Brennan, 356 U. S. at 114) to the power of sovereignty than Section 401(g) has to the war power.

Appellant's second premise—that "one who removes himself physically from the jurisdiction of the country in order to elude the grasp of our law * * * terminates the contract" (of citizenship) (Br. 49) is rebutted by the footnote 24 in his brief (Br. 45), citing *Blackmer* v. *United States*, 284 U. S. 421, as well as by his citation of *Kawakita* v. *United States*, 343 U. S. 717, 736, in which it was said: "An American citizen owes allegiance to the United States wherever he may reside."

The power which the Federal Government concededly has to compel citizens abroad to return to the United States "whenever the public interest requires it" (*Blackmer* v. *United States*, 284 U. S. 421, at 438), derives from the principle that the United States retains jurisdiction over its absent citizens.[11] The United States has the power to serve process over citizens abroad and can require them to attend its courts whenever properly summoned (*ibid.*). Its ultimate power permits the United States to enforce penalties against its citizens for violations of its laws (*ibid.*). (See also *United States* v. *Bowman*, 260 U. S. 94, 102.) Cf. Section 11, Selective Training and Service Act (54 Stat. 894; 50 U. S. C. App. 311) which provides for imprisonment for not more than five years or a fine of not more than $10,000, or both.

In a word, the United States national who resides abroad is never "wholly beyond its jurisdiction and power." (Br. 55) The severance of allegiance of a citizen is, therefore, not at all a recognition of any lack of power of the sovereign over the fugitive draft evader, as suggested by the appellant, but, as described by Mr. Justice Brennan, nothing more than naked vengeance.

Moreover, the legislative history of Section 401(j) refutes appellant's contention. In his letter to the Chairman

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[11] This is to be distinguished, of course, from the power of extradition which goes to the relation of the United States to a foreign government rather than to a citizen abroad, *supra*, at page 21.

of the Senate Immigration Committee the Attorney General stated that:

> "If and when they (draft delinquents) return to this country, it would seem proper that in addition (to the penalties under the Selective Training and Service Act) they should lose their citizenship." (*House Report 1229, supra*, page 2.)

If expatriation is determined *if and when the draft evaders return to the United States* it cannot be argued that the United States is then without power over fugitive draft evaders.

Indeed, appellant concedes that the initial determination that a national has been expatriated "will often be made by the Executive Branch, when it seeks to deport him as an alien illegally in the country, or to exclude him from entering the country (if he is outside), or to deny him a passport or some other right available to citizens" (Br. 51). Thus, the nationals whom the government seeks to expatriate not only have not "eluded the grasp of our law", but they are within the direct control of various agencies of the Executive Branch. Appellant's argument that Section 401(j) is a valid exercise of the inherent power of sovereignty cannot be sustained.

V

Section 401(j) Violates Procedural Due Process.

It has been noted that Section 401(j) "decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed". (*Trop*, Opinion of Mr. Chief Justice Warren, 356 U. S. at 94.)

The appellant, in response, concedes as true that an administrative agency can determine that a citizen is guilty

of draft evasion and has been expatriated, but says rather irrelevantly that there is no violation of due process because the citizenship claimant "*was* entitled to bring a declaratory judgment action to establish his citizenship under the Nationality Act of 1940" (Br. 51-52).[12] (Emphasis supplied.)

Even were this a complete statement of an expatriated citizen's procedural rights, whether the proper verb is "was" as the present Solicitor General says, or is "is," as the former Solicitor General says, it is clearly no substitute for the requirements which due process imposes before a citizen of the United States may be denationalized.

Huber v. Reid, *supra*, which this Court approved in *Kurtz v. Moffitt*, *supra* (see *Trop*, concurring opinion of Mr. Justice Brennan, 356 U. S. at 108), requires a trial and conviction upon the charge of desertion before expatriation can be imposed. The force of this opinion was recognized by the Cabinet Committee which proposed the enactment of 401(g), and that provision accordingly provided that expatriation could take effect only following a conviction. Codification of Nationality Laws, H. R. Comm. Print, Pt. I, 76th Cong., 1st Sess.

If due process requires that the deserter be convicted before he may be denationalized, no less can be required for the draft evader.[13] Significantly, although appellant

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[12] It is not without interest that the present Solicitor General has receded from the position taken by his predecessor in this appeal who stated in his brief in *Mackey v. Mendoza-Martinez*, No. 29, October Term, 1959 (Br. 31), that the citizenship claimant "*is* entitled to bring a declaratory judgment action to establish his citizenship" (Emphasis supplied.)

[13] It should be noted that appellee's conviction under Section 11 of the Selective Training and Service Act could be solely for "evad[ing] registration [or Service]" in the armed forces, whereas the expatriating conduct under 401(j) is for "departing from or remaining outside of the jurisdiction of the United States in time of war * * * or national emergency for the purpose of evading or avoiding training and service." Cf. 54 Stat. 894 with 58 Stat. 746.

argues that 401(j) does not violate due process, nowhere in his brief does he seek to distinguish the present case from *Huber* v. *Reily*. The principle of the *Huber* case, having received the gloss of approval of this Court as early as 1885 in *Kurtz* v. *Moffit*, *supra*, and direct approval in *Trop*, and the imprimatur of Congress when it enacted 401(g), must apply equally to an expatriation under Section 401(j). *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365.

Apart from this fundamental defect in Section 401(j), the citizenship claimant's rights in a declaratory judgment proceeding are not protected as fully as the appellant suggests (Br. 52-53).

First, it should be noted that Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. 903, was repealed by Section 403(a)(41) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 280, 8 U. S. C. 903. Therefore, unless the right of the citizen to bring a declaratory judgment action under that statute has been preserved by the saving clause of the latter statute, 66 Stat. 405, 8 U. S. C. 1101 [Cf. *Dulles* v. *Richter*, 246 F. 2d 709 (C. A. D. C. 1957); *Juns Fujii* v. *Dulles*, 224 F. 2d 906 (9th Cir., 1955)], Section 503 actions are no longer available to citizenship claimants.

This is especially significant for the expatriated citizen who is outside of the United States. While the declaratory judgment procedure is still available to the citizenship claimant under the general Declaratory Judgment Act, 28 U. S. C. 2201, and a review of an agency decision is available under the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009 [14] [see *Frank* v. *Rodgers*, 253 F. 2d 889 (C. A. D. C. 1958), and *Tom Muna Ngow* v. *Dulles*, 122 F. Supp. 709 (D. C. 1954)], neither of these remedies assure to the national abroad, who has been ruled expatriated

[14] Appellant here disagrees. This question is before this Court in the companion case, *Rusk* v. *Cort*, No. 20, this term.

by the administrative decision, the right to come to the United States and to appear personally in a judicial proceeding to enforce his claim. (Cf. *Rosasco* v. *Brownell*, 163 F. Supp. 45 (E. D. N. Y. 1958) and cases cited at 50-55.)

An expatriated citizen's right to appear in a court in the United States to testify in support of his nationality derives at present from the provisions of Section 360(b) of the 1952 Act, 66 Stat. 163, 273, 8 U. S. C. 1503. The issuance of a certificate of identity to enable the expatriated citizen to be admitted to the United States is there conditioned upon submitting "proof to the satisfaction of [a] diplomatic or consular officer that such action was instituted in good faith and upon a substantial basis * * * " (*supra*). Thus, the very ability to appear in a court in the United States to prove citizenship is made dependent upon satisfying the consular officer who has expatriated the citizen that the claim is "substantial". At present there is a division in the lower courts whether action lies to compel the Secretary of State to issue a certificate of identity to an expatriated citizen. Cf. *Dulles* v. *Lung*, 212 F. 2d 73 (9th Cir. 1954), and *Ling* v. *Dulles*, 119 F. Supp. 513 (D. C. 1954) (action does not lie), with *Sing* v. *Dulles*, 116 F. Supp. 9 (E. D. N. Y. 1953); *Acina* v. *Brownell*, 112 F. Supp. 15, 19 (S. D. Tex. 1953); *D'Argent* v. *Dulles*, 113 F. Supp. 933, 937 (D. C. 1953) (action lies if the refusal is arbitrary or capricious). Even the view most favorable to the expatriated citizen, however, accords the claimant only a review of the administrative refusal, which, needless to say, offers the expatriated citizen far less protection than either an absolute right to appear in court, or a *de novo* determination of his right to appear.

If the expatriated citizen should be unsuccessful in obtaining entry into the United States to testify on his own behalf, the result is the very "spectacle of a trial *in absentia*" which the appellant deplores (Br. 52).

But this is not all. If we assume that the expatriated citizen is able to obtain a certificate of identity, what then are his rights? They are set forth at Section 360(c) of the Act, *supra*:

> "A person who has been issued a certificate of identity under the provisions of subsection (b) and while in possession thereof, may apply to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States."

Appellant, again irrelevantly, refers to the repealed Section 503 of the Nationality Act of 1940 to say that "the trial *was* de novo" (Br. 52). Whether an expatriated citizenship claimant who is seeking entry to the United States is entitled to a *de novo* determination of his claim to citizenship (Br. 52) has not yet been firmly settled by this Court. Cf. *United States* v. *Ju Toy*, 198 U. S. 253, and *Tang Tun* v. *Edsell*, 223 U. S. 673, with *Ng Fung Ho* v. *White*, 259 U. S. 276. Compare also *Medeiros* v. *Watkins*, 166 F. 2d 897 (2nd Cir. 1948) with *Carmichael* v. *Delaney*, 170 F. 2d 239 (9th Cir. 1948).

But not even this problem is the end of the expatriated citizen's difficulties. Appellant admits (Br. 52) that even in a *de novo* trial, the plaintiff has the initial burden of establishing "the fact of his having been a citizen". Thus, at the very threshold of his case the expatriated citizen, whether abroad or in the United States, like the appellee, is met with a burden which is upon the Government in all

other judicial proceedings involving loss of citizenship. Cf. denaturalization proceedings, *Schneiderman* v. *United States*, 320 U. S. 118, 158. *Baumgartner* v. *United States*, 322 U. S. 665, 675; *Nowak* v. *United States*, 356 U. S. 660, 663; *Maisenberg* v. *United States*, 356 U. S. 670, 672.

In bald words, the national who has been ruled expatriated for draft evasion by an administrative decision, without a prior hearing, without prior conviction, without final sanction by a court, must nonetheless submit himself to the jurisdiction of the courts and agencies of the United States as though he were an alien. If he is an expatriated citizen outside the United States, his posture is that of an alien seeking admission to this country for the first time. Cf. *Shaughnessy* v. *Mezei*, 345 U. S. 205.

"This happens", the appellant explains in a blithe condonation (Br. 21), "because the officials, like the courts are required to enforce the statute and must apply it to the particular cases coming before them".

In view of the exacting procedures and standards of proof which this Court has required in denaturalization proceedings, it seems scarcely necessary to argue that a national of the United States may not be stripped of his citizenship, under the expatriation provisions of the nationality laws, by administrative fiat and then left to vindicate his rights before the courts as an alien outside the United States.

Whatever rights and privileges aliens may have in the United States, this Court has held from *United States* v. *Ju Toy*, *supra*, to *Shaughnessy* v. *Mezei*, *supra*, and *Leng May* v. *Barber*, 357 U. S. 185, with one exception, that due process is what Congress says it is for aliens who are not "in the United States." Cf. *Chew* v. *Colding*, 344 U. S. 590.

Therefore, the United States citizen, who has been denationalized "by the initial determination" of an adminis-

trative agency, may therefore, like *Mezei, supra*, if the appellant is correct, be held in detention and afforded no constitutional guaranty of due process at the threshold of the United States, while he attempts to vindicate his right to citizenship. Unlike an accused criminal in the United States, he is not even assured the right to make bail. His proceeding to enforce his claim to citizenship may, in these circumstances, become an empty form. If the slate of this Court in regard to decisions affecting aliens is "not clean" (*Galvan* v. *Press*, 347 U. S. 522, at 531) there seems little justification for eroding the rights of citizens of the United States by marking them down upon the slate which the decisions of this Court have hitherto reserved for aliens.

For the reasons we have given we believe that Section 401(j) violates the due process clause of the Fifth Amendment.

CONCLUSION

The appellant seeks in effect, to reargue the case of *Trop* v. *Dulles*, 356 U. S. 86, which has recently been the subject of two presentations to this Court. The authority of that case justifies a holding that 401(j) of the Nationality Act of 1940 is invalid.

Respectfully submitted,

JACK WASSERMAN,
DAVID CARLINER,
Attorneys for American Civil Liberties Union,
902 Warner Building,
Washington 4, D. C.

Of Counsel:
ROWLAND WATTS,
STEPHEN J. POLLAK,
OSMOND K. FRAENKEL.

September, 1961.

APPENDIX

DEPARTMENT OF JUSTICE

Washington 25, D. C.

December 5, 1944

CIRCULAR No. 3893

TO ALL UNITED STATES ATTORNEYS AND ALL FIELD OFFICES OF THE FEDERAL BUREAU OF INVESTIGATION AND THE IMMIGRATION AND NATURALIZATION SERVICE

Re: Public Law No. 431 (78th Congress): An Act to expatriate or exclude certain persons for evading military and naval service.

The above-mentioned Act (1) provides for automatic expatriation of a citizen of the United States who departs from, or remains outside of, the country during time of war or national emergency for the purpose of avoiding or evading military service, and (2) prohibits reentry to the United States of any alien who departed from the United States for the same purpose.

A substantial number of Selective Service delinquency cases involving aliens or dual-citizens who registered under the Selective Service Act while residing in the United States and who have since departed therefrom for the apparent purpose of evading military service are now being carried in a pending status by the United States Attorneys and the Field Offices of the Federal Bureau of Investigation. Extradition for prosecution in such cases is impossible.

It is anticipated that many such delinquents will attempt to return to the United States as the probability of being called for service becomes more and more remote. Under Public Law No. 431, such delinquents are ineligible for reentry, either as debarred aliens or expatriates, and in order that their cases may be closed in the offices of the United States Attorneys and the Federal Bureau of In-

vestigation, the following procedure is suggested and authorized:

(1) The United States Attorney shall examine his file and the investigative reports in each case, and upon determination that Public Law No. 431 is applicable, shall close the case, and notify the Field Office of the Federal Bureau of Investigation of his action.

(2) The Federal Bureau of Investigation will thereupon close its file in the case and furnish the Immigration and Naturalization Service with all information pertinent to the application of Public Law No. 431, and the application of the law from an administrative viewpoint shall thereafter be the responsibility of the Immigration and Naturalization Service.

(3) The United States Attorney shall notify the State Director of Selective Service of the names, order numbers and Local Boards of all such closed delinquency cases so that his records and those of the Local Boards may be appropriately noted.

The cases of United States citizens (other than so called dual citizens) who may have departed from or remained outside of the United States for the purpose of avoiding military service require different treatment than the cases of aliens or dual citizens. Such cases should be continued in a pending status at the present time so that consideration may be given to the matter of prosecution in the event of subsequent apprehension in the United States. At the same time, however, the facts in all such cases should also be made available by the Federal Bureau of Investigation, to the Immigration and Naturalization Service and also, where appropriate, to the State Department.

Where any doubt is entertained as to the disposition of any delinquency case which may fall within the purview of Public Law No. 431, the matter should be taken up with the Criminal Division in the Department.

FRANCIS BIDDLE,
Attorney General.